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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 279.

R. ALLYN LEWIS AND LAETITIA M. LEWIS,
APPELLANTS,

vs.

FRED HERRERA, RECEIVER OF THE INTERNATIONAL BANK IN NOGALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED AUGUST 8, 1906.

(20,327.)

(20,327.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 362.

R. ALLYN LEWIS AND LAETITIA M. LEWIS, APPELLANTS,

vs.

FRED HERRERA, RECEIVER OF THE INTERNATIONAL BANK IN NOGALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a R. ALLYN LEWIS and LAETITIA McD. LEWIS, Appellants,

vs.

FRED HERRERA, Receiver of the International Bank of Nogales, a Corporation, Appellee.

Transcript on Appeal.

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Plaintiff,

vs.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Defendants.

Complaint.

Comes now Fred Herrera, receiver for the International Bank in Nogales, a corporation, plaintiff, in his official capacity as such receiver, and complaining of R. Allyn Lewis and Laetitia M. Lewis, defendants, alleges:

I.

That plaintiff on the twenty-seventh day of January, A. D. 1904, in an action then and now pending in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, wherein one John Dessart was and is plaintiff and the International Bank in Nogales, a corporation, was and is defendant and one O. K. Franklin, administrator, was and is intervenor, was duly appointed by the said Court to be receiver of all the property and assets of the said International Bank in Nogales, and that thereafter, on the twenty-eighth day of January, A. D. 1904, plain-
2 tiff duly qualified as such receiver and has been such ever since and now is such; that plaintiff brings this suit by direction of said District Court.

and now is such; that plaintiff brings this suit by direction of said District Court.

II.

That under the direction of the said District Court plaintiff brought suit in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, against the above named defendant, R. Allyn Lewis, and on the twenty-third day of June, A. D. 1904, recovered judgment in the said cause of the tenor following:

"In the District Court of the First Judicial District of the Territory of Arizona in and for Santa Cruz County.

FRED HERRERA, Receiver of the Property of International Bank in Nogales, a Corporation, Plaintiff,

vs.

R. ALLYN LEWIS, Defendant.

Judgment.

"The Findings of Fact and Conclusions of Law heretofore made and filed in the above entitled cause having been duly considered by the Court, it is now Ordered, Adjudged, and Decreed:

"That Fred Herrera, receiver of the property of International Bank in Nogales, a corporation, plaintiff, do have and recover from R. Allyn Lewis, defendant in the above entitled cause, the
3 sum of $5,371.37, together with his costs in this cause expended, found to be and fixed at the sum of $12.05, for which let execution issue.

"Done in open court this 23d day of June, A. D. 1904.

"GEO. R. DAVIS, *Judge.*"

III.

That thereafter plaintiff caused the issuance of executions under the said judgment to the Sheriff of Santa Cruz County, and to the Sheriff of Maricopa County, Arizona Territory; that each of said executions was returned by the respective Sheriffs to the clerk of the said District Court for Santa Cruz county, wholly unsatisfied, the return showing that no property of the said defendant, R. Allyn Lewis, could be found respectively in either of the said counties, and that the said judgment still remains wholly unsatisfied.

IV.

That plaintiff knows of no property subject to execution under the said judgment, or which plaintiff can subject to the payment of the amount of the said judgment, or of any part thereof, other than is hereinafter set forth.

V.

That the indebtedness for which plaintiff recovered judgment against the said defendant, R. Allyn Lewis, as aforesaid, was incurred by the said R. Allyn Lewis on the 5th day of November, A. D. 1903, by reason of moneys had and received by the said R. Allyn Lewis from the said International Bank in Nogales, on said
4 date.

VI.

That the said defendant, R. Allyn Lewis, as plaintiff is informed and believes, was the owner of the north 25 feet of lots 1 and 3 in block 78, of lots 10 and 12 and the west 20 feet of lot 8 in block 16, of lots 3 and 4 in block 2 of Simm's addition to the city of

Phœnix, and lot 2 in block 1 of Simm's addition to the city of Phœnix, all situated in the city of Phœnix, Maricopa county, Arizona Territory, for a long time prior to the execution of certain instruments hereinafter described, and still is the owner thereof, except in so far as such ownership may be affected by the said instruments, and that the said property, as plaintiff is informed and believes, is of great value, to-wit: of the value of more than fourteen thousand dollars.

VII.

That, as plaintiff is informed and believes, there was recorded on January 16, 1904, in book 63 of deeds at page 548 in the records of Maricopa county aforesaid, an instrument purporting to have been executed by the said defendant, R. Allyn Lewis, in Cologne, Germany, on August 25, 1903, reciting a consideration of "one dollar and other valuable consideration," purporting to "give, bequeath and devise," and to "warrant and defend" to the said defendant, Laetitia M. Lewis, property described as situated in the city of Phœnix, Maricopa county, Arizona Territory, as follows: 2 lots, Simm's addition, formerly owned by C. M. Frazier; lot and dwelling in Simm's addition in which the said R. Allyn Lewis formerly lived;
5 the portion of lots and building on southwest corner of Adams and Center streets, known as the Lewis building; the property on the corner of Fifth street and Washington street, being 120 feet x 137½ feet, with two dwelling-houses; and agreeing to execute further warranty deed with accurate description; that, as plaintiff is informed and believes, the property described in the said instrument is substantially the property hereinbefore described by plaintiff in paragraph VI hereof; that the said instrument was acknowledged by the said R. Allyn Lewis before a Notary Public in the City and County of New York, State of New York, on the ninth day of January, A. D. 1904.

VIII.

That, as plaintiff is informed and believes, there was recorded in the records of said Maricopa county in book 63 of deeds at page 546 on January 16, 1904, a certain other instrument purporting to have been executed by the said defendant, R. Allyn Lewis, on December 29, 1903, wherein the consideration is set forth at "one dollar and other valuable consideration," purporting to "remise, release, sell, convey and quit-claim" to the said defendant, Laetitia M. Lewis, that certain property situated in Maricopa County, Arizona Territory, hereinbefore described by plaintiff in paragraph VI hereof; that the said instrument was acknowledged by the said defendant, R. Allyn Lewis, before a Notary Public in the city and county of New York, State of New York, on the ninth day of January, A. D. 1904.

6 IX.

That the said Laetitia M. Lewis, defendant herein, is and at all times herein mentioned was, as plaintiff is informed and believes, the wife of the said defendant, R. Allyn Lewis.

X.

That the said defendant, R. Allyn Lewis, executed the instruments hereinbefore described with intent to delay, hinder and defraud his creditors and plaintiff, and without valuable consideration; that the consideration named therein is fictitious and colorable only; and that the said instruments have the effect as conveyances of preventing plaintiff from subjecting the said property to the levy of execution under the judgment hereinbefore set forth.

XI.

That plaintiff at all times since the rendition of the hereinbefore described judgment has been and still is the owner thereof.

XII.

That, as plaintiff is informed and believes, he has no adequate remedy at law.

Wherefore, plaintiff prays that the hereinbefore described conveyances shall be set aside and held, adjudged and decreed to be void and of no effect as against this plaintiff and as against the levy of execution under the said judgment, and for such other relief as to the Court may seem appropriate, and for his costs of suit.

FRED HERRERA,

7 *Receiver for the International Bank in Nogales,*

By SELIM M. FRANKLIN AND
FREDERICK S. NAVE,
His Attorneys.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Frederick S. Nave, being duly sworn, deposes and says: that he is one of the attorneys of the plaintiff in the above entitled cause; that as such he knows the facts; that he has read the foregoing complaint and knows the contents thereof, and that the same is true in substance and in fact.

FREDERICK S. NAVE.

Subscribed and sworn to before me this 14 day of November, A. D. 1904.

My commission expires —— —, 190-.

[SEAL.]

ELIAS F. DUNLEVY,
Clerk District Court.

(Endorsed:) 4409. In the District Court, Third Judicial District Territory of Arizona, County of Maricopa. Fred Herrera, Receiver &c. *vs.* R. Allyn Lewis, *et al.* Complaint. Filed Nov. 14, 1904, at 12:05 P. M. Elias F. Dunlevy, Clerk.

8 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Plaintiff,

vs.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Defendants.

I.

And now comes the defendant, R. Allyn Lewis, and for his amended answer to plaintiff's complaint demurs thereto for that the same does not state facts sufficient to constitute a cause of action against him, this defendant.

Wherefore, he prays that plaintiff's complaint be dismissed and he have his costs of suit.

STREET & ALEXANDER,
Attorneys for Defendant R. Allyn Lewis.

Should defendant's demurrer be overruled, he then answers further and denies, that the indebtedness for which plaintiff recovered judgment against the said defendant, R. Allyn Lewis, as aforesaid, was incurred by the said R. Allyn Lewis on the 5th day of November, A. D. 1903, by reason of moneys had and received by the said R. Allyn Lewis from the said International Bank in Nogales on said date, or that said indebtedness ever was incurred

9 until after the making of said deed and deeds and the recording thereof in the County Recorder's office of Maricopa county, Arizona; and denies that he executed the instruments, or either of them, described in plaintiff's complaint, with intent to delay, hinder and defraud his creditors; and denies that the same was done without good and valuable consideration; and denies that the consideration is fictitious; and denies that the said instruments have or ever had the effect of preventing plaintiff from subjecting said property to the levy of execution under the judgment in fraud thereof, or in fraud of said International Bank or any other creditor or creditors.

II.

Defendant further answering says, that on August 25, 1903, for the good consideration of love and affection, he made, executed and delivered to his wife, Laetitia McD. Lewis, a deed for the property described in plaintiff's complaint, at Cologne, Germany, and that afterward in confirmance of said deed, and for the better assurance of the title of said property to her, he, in the city of New York, State of New York, on the 29th day of December, 1903, made, executed and delivered a further deed to her in conformity with the terms in the first deed; that all the said property was a gift to her, the said Laetitia McD. Lewis, for the benefit and better protection of herself as his wife and the children of himself and said Laetitia McD. Lewis as his wife; that at the time the deed was made in

Germany, to-wit: August 25, 1903, this defendant was not in debt to the International Bank in Nogales in the sum of anything, nor was he under any obligations toward said bank in reference to any debt whatever, but to the contrary, the International Bank in Nogales at that time was owing him, this defendant, the said R. Allyn Lewis; that he was not in debt to any one at that time over and above passing obligations for the payment of which he had abundance of money to pay and discharge at any time; this defendant says that at that time he had no intention of going into business for the purpose of creating any debts: he had no intention of becoming a debtor to the International Bank in Nogales, or any one else; that he was not about to engage in any new business and had not in contemplation becoming a debtor to any one, but at that time he was solvent and had about forty thousand dollars in money in bank and that this defendant conveyed the property situate in Phœnix, Arizona, including the family home and homestead that it and all the property conveyed might become her separate property of her, the said wife.

Wherefore, defendant prays that the plaintiff's complaint be dismissed and he have his costs.

STREET AND ALEXANDER,
Attorneys for Defendant R. Allyn Lewis.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

J. L. B. Alexander, being duly sworn, deposes and says: That he is one of the attorneys of the defendant in the above entitled cause and is acquainted with the facts in the foregoing answer set out; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge in substance and in fact, except to matters and things therein stated on information and belief and as to those matters and things he believes it to be true; that the defendant R. Allyn Lewis is absent from the territory and affiant as one of his attorneys makes this verification for and in his behalf.

J. L. B. ALEXANDER.

Subscribed and sworn to before me this 3rd day of April, A. D., 1905.

[SEAL.]

O. E. SCHUPP,
Notary Public.

My commission expires April 28, 1906.

(Endorsed:) No. 4409. Third Jud. Dist. Arizona. Maricopa County. Fred Herrera, Receiver, etc., Plaintiff, *vs.* R. Allyn Lewis and Laetitia M. Lewis, Defendants. Amended Answer. Rec'd Copy of within this 3rd of April, 1905. Frederick S. Nave, Att'y for Plaintiff. Filed April 3, 1905, at 10:30 o'clock A. M. Elias F. Dunlevy, Clerk. By Walter B. Kibbey, Deputy.

12 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Plaintiff,

vs.

R. ALLYN LEWIS and LAETITIA McD. LEWIS, Defendants.

Comes now the defendant, Laetitia McD. Lewis, and for her separate answer demurs to the complaint herein for that the same does not state facts sufficient to constitute a cause of action against her, and therefore asks that plaintiff's complaint be dismissed and she have her costs.

STREET & ALEXANDER,
Attorneys for the Defendant, Laetitia McD. Lewis.

Should her demurrer be overruled, she then answers further and says:

I.

That she and the defendant, R. Allyn Lewis, are husband and wife, and have been for many years past and have a family consisting of three minor children; that they formerly lived in Phœnix, Arizona, but are now temporarily residing in New York City, State of New York;

That the property described in plaintiff's complaint was all acquired after the marriage between herself and the said R.
13 Allyn Lewis, and at the time the deeds hereinafter set forth were made said R. Allyn Lewis had acquired a great deal of property both real and personal;

That on August 25, 1903, she and her said husband were in Cologne, Germany, and at that time and place he gave her all the real property which they had in the city of Phœnix, Territory of Arizona, in the name of R. Allyn Lewis, to be and become her separate property; that at that time the defendant, R. Allyn Lewis, was out of debt; that he was not owing the International Bank in Nogales anything, nor in any way obligated to the bank; that he was thoroughly solvent and had as much money in bank as is represented in value by the properties deeded at that time by him to this defendant; that neither she nor the defendant, R. Allyn Lewis, had with them at that time and place an accurate description of the real property which so stood in the name of said defendant, R. Allyn Lewis, and so a deed was made describing generally the real property in Phœnix, Arizona; said deed was made and signed by R. Allyn Lewis to this defendant, which is in words and figures following, to-wit:

"COLOGNE (GERMANY), *August* 25, 1903.

"For and in consideration of one dollar, to me in hand paid, and other valuable considerations, to me in hand paid, receipt of which is hereby acknowledged, I give, bequeath, demise, with full cove-

nants of warranty, to my wife, Laetitia McDermott Lewis, the following real property, situate in the County of Maricopa, City of Phœnix, Arizona Territory, to-wit: Two lots in Simms' addition, formerly owned by C. M. Frazier, and by him deeded to me, the accurate description of said property not being known to me at this time—lots and dwelling in Simms' addition in which I formerly lived, accurate description of said lot not being known to me at this time. The portions of lots and buildings on the southwest corner of Adams and Center streets, known as the Lewis building, the accurate description of said property not being known to me at this time, and the property on the corner of Fifth street and Washington street, being 120 by 137½ feet, with two dwelling houses, the accurate description of said property not being
14 known to me at this time.

"To have and to hold to her and her assigns forever, the titles to which property I shall forever warrant and defend, and I hereby agree to deliver unto said Laetitia McD. Lewis at any time she may elect a further warranty deed to all and singular the property hereinbefore mentioned, which deed shall contain accurate description of said property according to the records as contained in the County Recorder's office of Maricopa County, Arizona.

"R. ALLYN LEWIS. [SEAL.]"

Said deed was then and there delivered to this defendant, Laetitia McD. Lewis, by the defendant, R. Allyn Lewis; that she thereupon sent said deed to the County Recorder of Maricopa county, at Phœnix, Arizona, to be recorded; that the County Recorder of said Maricopa county received the same and returned the same to her unrecorded with the information that before it was recorded he would insist upon its being properly acknowledged by the grantor, R. Allyn Lewis; that upon their return to America and in the City of New York, the said R. Allyn Lewis, grantor, duly acknowledged the same before a Notary Public; whereupon this defendant again sent the deed to the Recorder of Maricopa county, Arizona, for record, where the same was placed on record on the 16th day of January, 1904, in book No. 63 of deeds, page 548; that before the same was acknowledged by R. Allyn Lewis, as aforesaid, he, the said R. Allyn Lewis, in conformity with the terms of said deed and for the purpose of making the descriptions of property therein contained more definite, on the 29th day of December, 1903, made, executed and delivered to her, the said Laetitia McD. Lewis, a second and further deed for the same property, which was intended only as a further assurance of a proper conveyance and a more definite description of the same; which said deed was duly acknowl-
15 edged and forwarded by her, this defendant, to the County Recorder of Maricopa county, at Phœnix, Arizona, for record and was at her request placed upon the records of Maricopa county on the 16th day of January, 1904, in book 63 of deeds, page 546.

II.

This defendant alleges that the transfers of said title from the defendant, R. Allyn Lewis, to herself were made in good faith for

a good and valuable consideration and without any intent to hinder, delay or defraud any creditor or creditors of the said R. Allyn Lewis, but that the same might become and be her separate property.

III.

The defendant, Laetitia McD. Lewis, denies each and every allegation of plaintiff's complaint, except the allegations in regard to the appointment of the plaintiff, Fred Herrera, as receiver for the International Bank in Nogales and the allegation of judgment recovered against R. Allyn Lewis in the sum of $5,371.37 in an action wherein he was defendant and Fred Herrera, receiver, was plaintiff, as set out in plaintiff's complaint.

And further denies that the indebtedness for which plaintiff recovered judgment against the said defendant R. Allyn Lewis, as aforesaid, was incurred by the said R. Allyn Lewis on the 5th day of November, 1903, by reason of moneys had and received by the said R. Allyn Lewis from the said International Bank in Nogales, or in any other manner on said date; and denies that said indebtedness ever was incurred until after the making of said deed
16 and deeds and the recording thereof in the County Recorder's office of Maricopa county, Arizona;

And denies that there was any indebtedness incurred by said R. Allyn Lewis, or that the said R. Allyn Lewis was in any way a debtor of or to the International Bank in Nogales prior to the 23d day of June, A. D. 1904;

And denies that there were any relations whatever between said R. Allyn Lewis and the International Bank in Nogales prior to the 23d day of June, 1904, which made said bank a creditor of R. Allyn Lewis to be affected in any way or any manner by any transfers of property which the said R. Allyn Lewis might make or did make before the 23d day of June, 1904;

And denies that the International Bank in Nogales have in any way been defrauded or that they or their creditors have in any way been fraudulently delayed or hindered in the collection of their debts by reason of said transfers of title from the said R. Allyn Lewis to herself.

And alleges that at the time said R. Allyn Lewis gave this defendant the property described in plaintiff's complaint and made transfers of title thereof that he had a full right to give and convey to her the same, and that such gift and conveyance did not in any way whatever defraud said International Bank in Nogales or any of its creditors;

And alleges that she is now the owner and ever since the 25th day of August, 1903, has owned, held and been in the possession of all the property described in plaintiff's complaint as her separate property free from the debts, obligations or liabilities of her
17 said husband, or any equities whatever in the plaintiff.

Wherefore, this defendant, Laetitia McD. Lewis, prays that the plaintiff's complaint be dismissed and she have her costs of suit.

STREET & ALEXANDER,
Attorneys for the Defendant, Laetitia McD. Lewis.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

J. L. B. Alexander, being duly sworn, deposes and says: That he is one of the attorneys of the defendant, Laetitia McD. Lewis, in the above entitled cause and is acquainted with the facts in the foregoing answer set out; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge in substance and in fact, except as to matters and things therein stated on information and belief and as to those matters and things he believes it to be true; that the defendant, Laetitia McD. Lewis, is absent from the territory and affiant as one of her attorneys makes this verification for and in her behalf.

J. L. B. ALEXANDER.

Subscribed and sworn to before me this 3rd day of April, A. D. 1905.

[SEAL.]

O. E. SCHUPP,
Notary Public.

My commission expires April 28, 1906.

18 (Endorsed:) No. 4409. Third Jud. Dist. Arizona, Maricopa County. Fred Herera, Receiver, etc. Plaintiff, *vs.* R. Allyn Lewis and Laetitia McD. Lewis, Defendants. Amended answer of Laetitia McD. Lewis. Recd. copy of the within Amended Answer this 4th day of April, 1905. Frederick S. Nave, Att'y for Plaintiff. Filed April 4, 1905. Elias F. Dunlevy, Clerk. By Walter B. Kibbey Deputy.

19 In the Supreme Court of the Territory of Arizona.

No. 955.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver for the International Bank of Nogales, a Corporation, Appellee.

Appeal from the District Court of Maricopa County.

Appearances.

Messrs. Street & Alexander, for Appellant.
Messrs. Selim M. Franklin, for Appellee.

Before Judge Edward Kent.

Opinion by DOAN, *J.:*

On August 25, 1903, while R. Allyn Lewis and Leatitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed of gift, conveying to her certain real property in Phœnix, Arizona. The deed was not acknowledged until January 9, 1904.

On December 29th, 1903, Lewis signed and delivered to his wife another deed, conveying to her as a gift the same property, but with a more accurate description, which second deed was also acknowledged on January 9, 1904. Both deeds were recorded in Maricopa County, Arizona on the 16th day of January, 1904. In November, 1903, Lewis became indebted to the International
20 Bank of Nogales, which indebtedness was subsequently, in June, 1904, sued on by Fred Herrera, the receiver of the Bank, and merged into a judgment against Lewis.

On August 25th, 1902, Lewis was solvent but on January 9th, 1903, was insolvent.

The suit at bar was brought by Herrera, receiver, to set aside the deeds and subject the property therein described to an execution under this judgment. It is admitted that there is no fraud in fact, or no intent in the mind of Lewis to defraud his creditors in the transfer made.

The District Court rendered judgment for the plaintiff upon an agreed statement of facts, submitted by the respective parties, and set aside the deeds and adjudged them to be void and of no effect against the plaintiff Herrera, and as against the levy of and the sale under execution, under the judgment theretofore rendered in the case against Lewis in June, 1904.

Appellant has assigned as error that:

"The Court erred in rendering judgment for the plaintiff upon said statement of facts, and in holding that the transfer of the property by the deed executed in Germany in August, 1903, by the husband to his wife did not carry immediately the whole title to the premises, and in holding that until the same was acknowledged and recorded it was a legal fraud upon the creditors of the husband, arising and becoming such creditors after the signing and delivering of the deed and before the acknowledgment."

21 There is but one question presented in this case, that is the operative effect of the deed from Lewis to his wife, dated August 25th, 1903, as against the bank to which he became indebted in November following.

The contention of the appellee herein, is that under the laws of Arizona, no conveyance of real property is valid, as to third persons, unless it is signed by the grantor and duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration.

That the deed of August 25th, therefore did not become effective as an instrument to convey title until it was acknowledged on January 9, 1904.

This case presents a simple question of statutory construction.

Paragraph 725, R. S. 1901, reads: "Every deed of conveyance of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

Paragraph 2698 reads: "Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it

appears that such debtor was then possessed of property within this territory, subject to execution, sufficient to pay his existing debts. * * *"

22 The provisions of par. 725, above cited, seem to us to permit of but one construction. When it says that every deed and conveyance of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments and properly certified to by him for registration, it is equivalent to saying that no deed, unless executed as therein provided will operate to effect a conveyance of real estate. This construction has been followed in the interpretation of a similar statute in Alabama by the Supreme Court of that state in Henderson *v.* White, 52 Ala. 597; Chadwick *v.* Carson, 78 Ala. 116 (22 So. Rep. 28). The United States Supreme Court, in Clark *v.* Graham, 6 Wheaton 577, and the Supreme Court of Ohio, in Smith *v.* Hunt, 13 Ohio, 260, have also placed a like construction upon a similar statute.

Neither the deed of August 25th, nor of December 29th, 1902, was effective to convey title, until acknowledged January 9th, 1903; and before that date the bank became a creditor of the grantor, Lewis, and, as is admitted in the agreed statement of facts, Lewis was not then possessed of property within this Territory subject to execution sufficient to pay his existing debts; the deeds, being deeds of gift, were both void as to the bank, and as to Herrera, the receiver, under the provisions of par. 2698, above cited.

The judgment of the lower court is therefore affirmed.

FLETCHER M. DOAN, *A. J.*

23 We concur:

RICHARD E. SLOAN, *A. J.*
JOHN H. CAMPBELL, *A. J.*

(Endorsed:) No. 955. In the Supreme Court of the Territory of Arizona. R. Allyn Lewis, *et al. vs.* Fred Herrera. Opinion, Doan, A. J. Filed Mar. 30, 1906. S. M. Cullom, Clerk.

24 In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA McD. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank in Nogales, Appellee.

Motion for Rehearing.

And now comes the appellants, R. Allyn Lewis and Laetitia McD. Lewis, and moves the court for a rehearing in the above entitled cause. That the decision and opinion of the court in said cause was filed on the 30th day of March, 1906, and this motion is filed within fifteen days thereafter.

That the grounds of relief relied upon for the rehearing is specified as follows, to-wit:

That the Supreme Court was laboring under the belief as announced in its opinion that R. Allyn Lewis at the time that the claim of the International Bank in Nogales against R. Allyn Lewis, upon which judgment finally determined R. Allyn Lewis to be responsible to said bank as a debtor, that he the said R. Allyn Lewis was insolvent while as a matter of fact the said R. Allyn Lewis at that time was not insolvent and the record shows the said R. Allyn Lewis to be solvent.

That the record shows that at the time R. Allyn Lewis made the transfer by a deed duly acknowledged and recorded that there was no indebtedness whatever from R. Allyn Lewis to the Inter-
25 national Bank in Nogales, and that said International Bank in Nogales did not have a judgment lien or any other lien on the property of R. Allyn Lewis so transferred and conveyed by him to Leatitia McD. Lewis; all of which the Supreme Court overlooked as a matter of fact and misconstrued the law applicable to the fact in that particular as revealed by the record.

That the Supreme Court misconstrued paragraph 725 of the Revised Statutes of Arizona, 1901, in holding that conveyances under said statute did not become such either between the parties thereto or to creditors until such conveyances were duly acknowledged before some officer and certified by him for registration. That such construction is wholly in variance with the decisions of other states, except the state of Alabama, and is not the construction given to the identical statute in the state of Texas and had been given by the state of Texas before the same had been incorporated in our statute, and that the Supreme Court entirely overlooked the construction given the statute from the state of Texas from which the same was borrowed and by other similar statutes from numerous other states, and wholly disregarded the construction given by Texas and other states.

That if the argument and briefs of appellants had been properly understood the Supreme Court could not have come to the conclusion and entered the opinion that, every deed of conveyance before it becomes operative as such for any purpose must be duly acknowledged before some officer authorized to take acknowledgments and
26 properly certified by him for registration.

Wherefore, appellants move for a rehearing of the judgment, decision and opinion of the Supreme Court on appeal heretofore made on the 30th day of March, 1906. And appellants will ever pray.

STREET & ALEXANDER,
Attorneys for Appellants.

(Endorsed:) No. 955. In the Supreme Court of the Territory of Arizona. R. Allyn Lewis, and Laetitia McD. Lewis, Appellants, *vs.* Fred Herrera, Receiver, etc., Appellee. Motion for Rehearing. Filed Apr- 10, 1906, S. M. Cullom, Clerk.

27 *Allowance of Appeal to the Supreme Court of the United States.*

In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank in Nogales, a Corporation, Appellee.

The above named appellants, R. Allyn Lewis and Laetitia M. Lewis, conceiving themselves aggrieved by the judgment of the Supreme Court of the Territory of Arizona, made and entered on the 30th day of March, 1906, in the above entitled cause, and the record in said case showing the value of the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed, and that a transcript of the record proceedings and papers upon which said judgment, and decree, was made, duly authenticated, may be sent to the Supreme Court of the United States.

STREET & ALEXANDER,
Attorneys for Appellants.

Dated this 28th day of May, 1906.

28 The foregoing claim of appeal is allowed upon the appellants giving an appeal bond in the sum of one thousand dollars; which is herewith executed, approved and filed.

Dated, the 28 day of May, 1906.

RICHARD E. SLOAN,
Associate Justice Supreme Court of Territory of Arizona.

(Endorsed:) No. 955. In the Supreme Court of the Territory of Arizona. R. Allyn Lewis and Laetitia M. Lewis, Appellants, *vs.* Fred Herrera, Receiver of the International Bank in Nogales, a corporation, Appellee. Allowance of Appeal to the Supreme Court of the United States. Filed May 28, 1906. S. M. Cullom, Clerk, By Angie B. Parker, Deputy.

29 No. —.

In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Appellee.

A Statement of the Facts of the Case in the Nature of a Special Verdict by the Supreme Court of the Territory of Arizona for Purposes of Appeal to the Supreme Court of the United States.

The issues raised by the pleadings in the District Court of Maricopa County were tried upon an agreed statement of ultimate facts which are as follows, to-wit:

"It is hereby stipulated and agreed by and between the parties to this cause, that the cause shall be submitted to the Court and tried upon the following agreed statement of facts:

30 I.

"That plaintiff on the twenty-seventh day of January, A. D. 1904, in an action then and now pending in the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, wherein one John Dessart was and is plaintiff and the International Bank in Nogales, a corporation, was and is defendant and one O. K. Franklin, administrator, was and is intervenor, was duly appointed by the said court to be receiver of all the property and assets of the said International Bank in Nogales, and that thereafter on the twenty-eighth day of January, A. D. 1904, plaintiff duly qualified as such receiver and has been such ever since and now is such; that plaintiff brings this suit by direction of said District Court.

II.

"That under the direction of the said District Court plaintiff brought suit in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, against the above named defendant, R. Allyn Lewis, and on the twenty-third day of June, A. D. 1904, recovered judgment in the said cause of the tenor following:

"The Findings of Fact and Conclusions of Law heretofore made and filed in the above entitled cause having been duly considered by the Court, it is now Ordered, Adjudged and Decreed:

31 "That Fred Herrera, receiver of the property of International Bank in Nogales, a corporation, plaintiff, do have and recover from R. Allyn Lewis, defendant in the above entitled cause, the sum of $5,371.37, together with his costs in this cause expended, found to be and fixed at the sum of $12.05, for which let execution issue.

"Done in open court this 23rd day of June, A. D. 1904.

"GEO. R. DAVIS, *Judge.*"

"The Findings of Fact and Conclusions of Law in the said cause are as follows, to-wit:

"This cause coming on the 22d day of June, A. D. 1904, duly to be heard, plaintiff above named being represented by F. S. Nave and S. M. Franklin, his attorneys; the defendant being represented by W. H. Barnes and J. L. B. Alexander, his attorneys; oral and documentary evidence of the respective parties having been heard, and the admission of the defendant in open court having been heard and considered, and arguments of counsel having been duly heard and considered; this cause now finally on this 23d day of June, A. D. 1904, being submitted and the Court being fully advised in the premises, does find the following facts, and therefrom, conclusions of law:"

Findings of Fact by District Court of Santa Cruz County.

I.

"That on the 27th day of January, A. D. 1904, at the city of Tucson, county of Pima, Territory of Arizona, in an action then pending in the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, wherein John Dessart was plaintiff and O. K. Franklin, administrator, was intervenor, upon an application made by the said John Dessart and said O. K. Franklin, intervenor, and by order duly made by said court, this plaintiff was appointed receiver of all of the property and assets of the said International Bank in Nogales; that thereafter and on the 28th day of January, 1904, this plaintiff did give his bond as required by the said order as such receiver, which said bond was duly approved by the clerk of said court, and with such approval was filed in the said court, on the 28th day of January, 1904, that on the 19th day of March, 1904, plaintiff, as receiver, duly obtained leave of the said court to bring this action.

II.

"That at all the times hereinafter mentioned, said International Bank in Nogales was and still is a corporation organized and existing under the laws of the Territory of Arizona; that during
32 all of said times, defendant was and still is a stockholder and a director of said corporation, and the vice-president thereof.

III.

"That on the said 27th day of January, 1904, defendant was and still is indebted to the said International Bank in Nogales, and to this plaintiff as receiver thereof in the sum of $5,216.81, with interest thereon as hereinafter set forth, on account of moneys loaned by said International Bank in Nogales to said defendant and to moneys paid out by said bank to said defendant at his instance and request, and for Mexican silver sold and delivered by said International Bank in Nogales to said defendant at his instance and request, and for moneys had and received by said defendant for the

use and benefit of said bank, which defendant has failed and refused to pay to said bank.

IV.

"That of the amount so due and unpaid from defendant as aforesaid, the sum of $430.44 thereof, is for an overdraft of defendant, to-wit: moneys paid by said bank to defendant in excess of the moneys on deposit by said defendant with said bank.

"That the sum of $136.37 thereof is for $304.30 Mexican dollars, of the value of $136.37, sold and delivered by said bank to defendant, and for which he has not paid.

"That the sum of $4,650.00 is for a part of the money paid by said bank to said defendant upon two certain certificates of deposit, each issued by said bank to said defendant, each dated on or about November 5, 1903, one for the sum of $3,875.00, which sum was paid to defendant by said bank upon said certificate of deposit on November 14, 1903; and one for the sum of $3,000.00, which said certificate was paid by said bank to said defendant on said certificate of deposit on the 15th day of December, 1903.

That each of said certificates of deposit was issued to said defendant by said bank, without any consideration whatsoever, and that the facts in regard to the issuance and delivery thereof by said bank to said defendant are as follows: That on the 5th day of November, 1903, one L. F. Swain was and for a long time prior thereto had been a stockholder, a director and cashier of said International Bank in Nogales, and said Swain on said day was, and for a long time prior thereto had been, indebted to said bank in a large sum of money, which he did not pay, and has not paid, and has been unable to pay, and that at said time said Swain was insolvent and unable to pay his debts, all of which was known to said defendant; that on or about said 5th day of November, 1903, defendant was owner of 98 shares of the capital stock of said corporation; that at all said times one John Dessart was a stockholder, a director
33 and the president of said bank; that on or about said day said defendant sold and delivered to said Dessart 98 shares of the capital stock of said bank, and received from said Dessart, as payment therefor, a check drawn by said L. F. Swain on said bank, payable to the order of said defendant, for the sum of $11,875.00; that at the time said Swain executed and delivered said check to defendant said Swain had no money or funds on deposit with said bank, but, on the contrary, owed said bank more than $6,000.00, which he was unable to pay, and was utterly insolvent; all of which said defendant and said John Dessart and said Swain well knew; that said check was of no value whatsoever; nevertheless, said Lewis caused said Swain, as cashier, to deposit the same to the credit of said Lewis, and on account of said credit said Lewis obtained three certificates of deposit from said bank, with the knowledge and consent of his co-directors, said Dessart and said Swain, said certificates of deposit being dated November 5, 1903, being payable to the order of said defendant for the sums of $3,875, $3,000 and $5,000, respectively; that thereafter, and on November 14, 1903, the said Swain, as such cashier, paid from the funds of said bank to de-

fendant the sum of $3,875, upon surrender by defendant of the certificate for deposit for said sum; and thereafter and on December 15, 1903, the said Swain, as such cashier, paid from the funds of said bank to defendant the sum of $3,000, upon the surrender by the defendant of the certificate for said sum.

"That said certificate of deposit for $5,000 is still in the possession of the said defendant unpaid; that upon the security of the said 98 shares of the capital stock, the said Desart and the said Swain obtained the sum of 5,000 Mexican dollars from P. Sandoval & Company, bankers of Nogales, Sonora, and immediately deposited the proceeds thereof, to-wit: $2,225, in the said International Bank in Nogales, to the credit of the said L. F. Swain, for the use and benefit of the said International Bank in Nogales, in the same account of the said L. F. Swain in which was charged the said check for $11,875.

"That defendant has not repaid or offered to repay said International Bank in Nogales, or plaintiff, said sums or any part thereof;

"That no demand was made upon defendant for the repayment of said sums of $430.44 and $136.37 until the filing of the suit in this cause.

Conclusions of Law of District Court of Santa Cruz County.

"As Conclusions of law from the foregoing Facts the Court
34 finds that the said defendant obtained the sum of $6,875.00 upon the certificate of deposit therein mentioned without giving any consideration whatsoever to the bank therefor;

"That said defendant is entitled to credit as against said amount of $6,875.00 for the sum of $2,225.

"That said plaintiff is entitled to recover from said defendant $4,650.00, being the balance of the said sum of $6,875.00, with interest thereon at the rate of six per cent. per annum from December 15, 1903;

"That plaintiff is entitled to recover from said defendant $567.81, being the sum total of the two said items of $430.44 and $136.37, with interest thereon from March 30, 1904.

"Done in open court this 23d day of June, A. D. 1904.

"GEO. R. DAVIS, *Judge.*"

III.

"That thereafter plaintiff caused issuance of executions under the said judgment to the Sheriff of Santa Cruz county and to the Sheriff of Maricopa county, Arizona Territory; that each of said executions was returned by the respective Sheriffs to the clerk of the said District Court for Santa Cruz county wholly unsatisfied, the return showing that no property of the said defendant, R. Allyn Lewis, could be found respectively in either of the said counties, and that the said judgment still remains wholly unsatisfied.

IV.

"That plaintiff knows of no property subject to execution under the said judgment or which plaintiff can subject to the payment of

the amount of the said judgment, or of any part thereof, other than is hereinafter set forth.

35 V.

"That the defendant, R. Allyn Lewis, was the owner in fee simple of the north 25 feet of lots 1 and 3 in block 78, of lots 10 and 12, and the west 20 feet of lot 8 in block 16, in the city of Phœnix, Maricopa County, Arizona, and of lots 3 and 4 in block 2, and of lot 2 in block 1 Simm's addition to said city of Phœnix, in said county and Territory on the 25th day of August, 1903, and for a long time prior thereto, and for a long time prior to the execution of a certain instrument of date August 25, 1903, hereinafter set forth, and still is the owner thereof, except insofar as such ownership may be affected by said instrument, and that said property is of the value of more than $14,000.

VI.

"The property described in the preceding paragraph was all acquired by purchase with community funds by defendant R. Allyn Lewis after his marriage with the defendant Lactitia McD. Lewis; that on August 25, 1903, the defendant R. Allyn Lewis and the defendant Lactitia McD. Lewis were in Cologne, Germany; that at that time the defendant R. Allyn Lewis was in no wise indebted to the International Bank in Nogales, and was solvent; that neither the defendant Lactitia McD. Lewis, nor the defendant, R. Allyn Lewis, had at that time and place an accurate description of the real property which stood in the name of the said defendant, R.
36 Allyn Lewis, in Phœnix, Arizona; that an instrument in writing was at that time and place made and signed by R. Allyn Lewis, and delivered to the defendant, Lactitia McD. Lewis, which said writing was in words and figures as follows, to-wit:

"Cologne (Germany), *August* 25, 1903.

"For and in consideration of one dollar, to me in hand paid, and other valuable considerations, to me in hand paid, receipt of which is hereby acknowledged, I give, bequeath, demise, with full covenants of warranty, to my wife, Lætitia McDermott Lewis, the following real property, situate in the County of Maricopa, City of Phœnix, Arizona Territory, to-wit: Two lots in Simms' addition, formerly owned by C. M. Frazier, and by him deeded to me, the accurate description of said property not being known to me at this time—lots and dwelling in Simms' addition in which I formerly lived, accurate description of said lot not being known to me at this time. The portions of lots and buildings on the southwest corner of Adams and Center Streets, known as the Lewis building, the accurate description of said property not being known to me at this time, and the property on the corner of Fifth street and Washington street, being 120 by 137½ feet, with two dwelling houses, the accurate description of said property not being known to me at this time.

"To have and to hold to her and her assigns forever, the titles

to which property I shall forever warrant and defend, and I hereby agree to deliver unto said Laetitia McD. Lewis at any time she may elect a further warranty deed to all and singular the property hereinbefore mentioned, which deed shall contain accurate description of said property according to the records as contained in the County Recorder's office of Maricopa County, Arizona.

R. ALLYN LEWIS. [SEAL.]"

"That the defendant, Laetitia McD. Lewis, thereupon sent said written instrument to the County Recorder of Maricopa County, at Phœnix, Arizona, to be recorded; that the County Recorder of said Maricopa county received the same and returned the same to her unrecorded, with the information that before he would record the same it must be properly acknowledged by the grantor, R. Allyn Lewis; that upon the return of defendants to America
37 the said R. Allyn Lewis, in the city of New York, State of New York, on January 9, 1904, acknowledged the said instrument in writing before a Notary Public, which said acknowledgment was in words and figures following, to-wit:

"STATE OF NEW YORK,
City and County of New York, Borough of Manhattan, ss:

"Before me, Joseph H. Fargis, a Notary Public in and for the county of New York, residing in the State of New York, borough of Manhattan, city and county of New York, on this day personally appeared R. Allyn Lewis known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

"Given under my hand and seal of office this 9th day of January, 1904.

"[NOTARY SEAL.] JOSEPH H. FARGIS,
Notary Public, N. Y. Co.

"My commission expires as Notary Public on March 30, 1904."

"Whereupon the defendant, Laetitia McD. Lewis, again sent the said written instrument with said acknowledgment thereon to the Recorder of Maricopa county, Arizona, for record, where the same was recorded on the 16th day of January, A. D. 1904, in book No. 63 of deeds at page 548; that before the said instrument was acknowledged by the defendant, R. Allyn Lewis, as aforesaid, the said R. Allyn Lewis, in conformity with the terms of the said written instrument, for the purpose of making the descriptions of property therein contained more definite, on the 29th day of December, A. D. 1903, signed and delivered to the said Laetitia McD. Lewis a written instrument of the tenor hereinafter set forth, and did acknowledge the same before a Notary Public in the city and county of New York, State of New York, on the 9th day of January, A. D. 1904, which said instrument was thereafter recorded

by the County Recorder of Maricopa County, at Phœnix,
38 Arizona, at the request of the said Laetitia McD. Lewis, on the 16th day of January, A. D. 1904, in book 63 of deeds at page 546; that the consideration of each of the said written instruments from the said R. Allyn Lewis to his said wife, Laetitia McD. Lewis, was love and affection for the benefit and better protection of herself as his wife, and the children of himself and the said defendant, the last mentioned instrument with the acknowledgment thereon is in words and figures following, to-wit:

"This indenture, made the 29th day of December in the year of our Lord, one thousand nine hundred and three, between R. Allyn Lewis of the city of Phœnix, Territory of Arizona, party of the first part, and Laetitia McD. Lewis, of the city of Phœnix, Territory of Arizona, party of the second part:

"Witnesseth: That the party of the first part, for and in consideration of the sum of one dollar and other valuable considerations to the party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quit-claimed, and by these presents does remise, release, sell, convey and quit-claim unto the said party of the second part and her assigns, forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following lots and parcels of land situate, lying and being in the County of Maricopa, Territory of Arizona, as follows, to-wit: north twenty-five (25) feet of lots numbered one (1) and three (3) in block seventy-eight (78) in the city of Phœnix, county of Maricopa, Territory of Arizona.

"Lots numbers ten (10) and twelve (12) and the west twenty (20) feet of lot number eight (8) in block sixteen (16) in the city of Phœnix, county of Maricopa, Territory of Arizona.

"Lots numbers three (3) and four (4) in block two (2) and lot number two (2) in block one (1) in Simm's addition to the city of Phœnix, County of Maricopa, Territory of Arizona. Together with all and singular the lands, tenements, and appurtenances thereunto belonging or in any-wise appertaining, and the reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold all and singular the premises above
39 mentioned and described, with the appurtenances thereunto belonging, unto the said party of the second part or her assigns, and *its* successors, to *its* only use, benefit and behoof forever.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

R. ALLYN LEWIS. [SEAL.]

"Sealed and delivered in the presence of
JOSEPH H. FARGIS.

"STATE OF NEW YORK,
City and County of New York, Borough of Manhattan, ss:

"Before me, Joseph H. Fargis, a Notary Public in and for the County of New York, residing in the State of New York, Borough of Manhattan, City and County of New York, on this day personally appeared R. Allyn Lewis, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed: Given under my hand and seal of office this 9th day of January, A. D. 1904.

[NOTARY SEAL.] JOSEPH H. FARGIS,
Notary Public, N. Y. Co.

"My commission as Notary Public expires on the 30th day of March, 1904."

VII.

"That the written instruments described in the preceding paragraphs were made in good faith and without any actual intent or intention to hinder, delay or defraud any creditor or creditors of the said R. Allyn Lewis so far as the conscious faith, intent and intention of the said R. Allyn Lewis are concerned, and were made, executed and delivered to the said Laetitia McD. Lewis in order that the same might become and be the separate property of her the said Laetitia McD. Lewis, it being expressly understood and stipulated that plaintiff does not admit that the instruments in question, or either of them, were as a matter of law made in good faith and without intent or intention to hinder or delay or defraud any creditor or creditors of the said R. Allyn Lewis.

"That at the time the instrument in writing hereinbefore mentioned was made at Cologne, Germany, on the 25th day of August, 1903, by the defendant, R. Allyn Lewis, to the defendant, Laetitia McD. Lewis, his wife, the defendant, R. Allyn Lewis, was not indebted to the International Bank in Nogales in the sum of anything, nor was he under any obligations towards said bank in reference to any debt whatever; but on the contrary the International Bank in Nogales at that time was owing the defendant, R. Allyn Lewis; and that the defendant, R. Allyn Lewis, at that time had no intention of going into business for the purpose of creating any debt; that he had no intention of becoming a debtor to the International Bank in Nogales, but that at that time he was solvent and had about forty thousand dollars in money in bank and that he executed the instrument hereinbefore first set forth, that the property hereinbefore described might become the separate property of his said wife, Laetitia McD. Lewis.

VIII.

"That the said Laetitia McD. Lewis, defendant herein, is and at all times herein mentioned was the wife of the said defendant, R. Allyn Lewis, and *have* a family consisting of three minor children.

IX.

"That plaintiff at all times since the rendition of the hereinbefore described judgment has been and still is the owner thereof.

X.

"The indebtedness of defendant, R. Allyn Lewis, for an overdraft of $430.44 and for $136.37 for Mexican dollars sold and delivered by the International Bank to the defendant, R. Allyn Lewis,
41 named in Paragraph IV of the Findings of Fact, set forth in paragraph II herein, was incurred and made between November 5, 1903, and December 15, 1903.

FREDERICK S. NAVE AND
SELIM M. FRANKLIN,
Attorneys for Plaintiff.
STREET & ALEXANDER,
Attorneys for Defendants, R. Allyn Lewis and Laetitia McD. Lewis.

"Certified to by the Court to be correct.
EDWARD KENT, *Judge.*"

The case having been tried upon the foregoing agreed statement of ultimate facts, the District Court of Maricopa County before which the cause was tried, accepted said Statement of Facts and adopted the same as its findings of fact, and upon those findings of fact and conclusions of law the said District Court of Maricopa County rendered the following judgment:

Judgment of District Court of Maricopa County.

"This cause, wherein Fred Herrera, receiver for the International Bank in Nogales, a corporation, is plaintiff, and R. Allyn Lewis and Laetitia M. Lewis are defendants, having come on duly to be heard on the twenty-seventh day of May, A. D. 1905, and the said parties having submitted the matters in controversy between them to the Court upon an agreed statement of facts, made out and signed by their counsel, and filed with the clerk, the matter then having been fully argued and taken under advisement, and
42 the Court now being fully advised in the premises, and now having certified the said agreed statement of facts to be correct, the Court does now render judgment thereon in favor of the plaintiff and against the defendants, and therefore;

"It is now ordered, adjudged and decreed that those certain conveyances, to-wit: That certain conveyance in the words and figures following, to-wit:

"COLOGNE (GERMANY), *August* 25, 1903.

"For and in consideration of one dollar, to me in hand paid, and other valuable considerations, to me in hand paid, receipt of which is hereby acknowledged, I give, bequeath, demise, with full covenants

of warranty, to my wife, Laetitia McDermott Lewis, the following real property, situate in the County of Maricopa, city of Phœnix, Arizona Territory, to-wit: Two lots in Simms addition, formerly owned by C. M. Frazier, and by him deeded to me, the accurate description of said property not being known to me at this time—lots and dwelling in Simms' addition in which I formerly lived, accurate description of said lot not being known to me at this time. The portions of lots and buildings on the southwest corner of Adams and Center Streets, known as the Lewis building, the accurate description of said property not being known to me at this time, and the property on the corner of Fifth street and Washington street, being 120 by 137½ feet, with two dwelling houses, the accurate description of said property not being known to me at this time.

"To have and to hold to her and her assigns forever, the titles to which property I shall forever warrant and defend, and I hereby agree to deliver unto said Laetitia McD. Lewis at any time she may elect a further warranty deed to all and singular the property hereinbefore mentioned, which deed shall contain accurate description of said property according to the records as contained in the County Recorder's office of Maricopa county, Arizona.

"R. ALLYN LEWIS. [SEAL.]

"STATE OF NEW YORK,
City and County of New York, Borough of Manhattan, ss:

"Before me, Joseph H. Fargis, a Notary Public in and for the County of New York, residing in the State of New York, borough of Manhattan, city and county of New York, on this day personally appeared R. Allyn Lewis known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration
43 therein expressed.

"Given under my hand and seal of office this 9th day of January, 1904.

"[NOTARY SEAL.] JOSEPH H. FARGIS,
"*Notary Public, N. Y. Co.*

"My Commission expires as Notary Public on March 30, 1904."

"which said conveyance is recorded in the records of Maricopa County, Arizona Territory, in Book 63 of Deeds at page 548; and that certain conveyance in the words and figures following, to-wit:

"This indenture, made this 29th day of December in the year of our Lord, one thousand nine hundred and three, between R. Allyn Lewis of the city of Phœnix, Territory of Arizona, party of the first part, and Laetitia McD. Lewis, of the city of Phœnix, Territory of Arizona, party of the second part:

"Witnesseth: That the party of the first part, for and in consideration of the sum of one dollar and other valuable considerations to the party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowl-

edged, has remised, released, sold, conveyed and quit-claimed, and by these presents does remise, release, sell, convey and quit-claim unto the said party of the second part and her assigns, forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following lots and parcels of land situate, lying and being in the County of Maricopa, Territory of Arizona, as follows, to-wit: north twenty-five (25) feet of lots numbered one (1) and three (3) in block seventy-eight (78) in the city of Phœnix, county of Maricopa, Territory of Arizona.

"Lots numbers ten (10) and twelve (12) and the west twenty (20) feet of lot number eight (8) in block sixteen (16) in the city of Phœnix, county of Maricopa, Territory of Arizona.

"Lots numbers three (3) and four (4) in block two (2) and lot number two (2) in block one (1) in Simm's addition to the city of Phœnix, County of Maricopa, Territory of Arizona. Together with all and singular the lands, tenements, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold all and singular the premises above mentioned and described, with the appurtenances thereunto belonging, unto the said party of the second part or her assigns, and its successors, to its only use, benefit and behoof forever.

44 "In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"R. ALLYN LEWIS. [SEAL.]

"Sealed and delivered in the presence of
"JOSEPH H. FARGIS.

"STATE OF NEW YORK,
City and County of New York, Borough of Manhattan, ss:

"Before me, Joseph H. Fargis, a Notary Public in and for the County of New York, residing in the State of New York, Borough of Manhattan, City and County of New York, on this day personally appeared R. Allyn Lewis, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office this 9th day of January, A. D. 1904.

"[NOTARY SEAL.] JOSEPH H. FARGIS,
Notary Public, N. Y. Co.

"My commission as Notary Public expires on the 30th day of March, 1904."

which said conveyance is recorded in the records of Maricopa County, Arizona Territory, in Book 63 of Deeds, page 546, be and each of them is hereby set aside and held, adjudged and decreed to be void and of no effect as against the plaintiff in this cause and as against the levy of and sale under execution under the judgment of the Dis-

trict Court of the First Judicial District of the Territory of Arizona, in and for the county of Santa Cruz against the said defendant, R. Allyn Lewis, in which the plaintiff in this cause was plaintiff and the said defendant, R. Allyn Lewis, was defendant, which said judgment, omitting the title of the court and cause, is of the tenor following, to-wit:

"The Findings of Fact and Conclusions of Law heretofore made and filed in the above entitled cause having been duly considered by the Court, it is now ordered, adjudged and decreed;

"That Fred Herrera, receiver of the property of International Bank in Nogales, a corporation, plaintiff, do have and recover
45 from R. Allyn Lewis, defendant in the above entitled cause, the sum of $5,371.37, together with his costs in this cause expended, found to be and fixed at the sum of $12.05, for which let execution issue.

"Done in open court this 23d day of June, A. D. 1904.

"GEO. R. DAVIS, *Judge.*"

and that the said plaintiff do have and recover from the said defendants and from each of them its costs in this cause expended, found to be fixed at the sum of $8.70 dollars, for which let execution issue.

"Done in open Court this twenty-sixth day of September, A. D. 1905.

"EDWARD KENT, *Judge.*"

The defendants in said action, R. Allyn Lewis and Laetitia M. Lewis, appealed from said judgment of the district court of Maricopa County to the Supreme Court of the Territory of Arizona.

Such appeal having been perfected, came on regularly for hearing on appeal and was heard by and submitted to the Supreme Court of the Territory of Arizona. The said Supreme Court adopted the findings of fact made by the district court of Maricopa County, as contained in the agreed statement of facts in the trial of said cause in that court, as its findings of fact for the said Supreme Court, and upon such findings of fact the Supreme Court of the Territory of Arizona affirmed the judgment of the district court of Maricopa county, as shown by the records thereof, as follows, to-wit:

46 No. 955.

"R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank in Nogales, Appellee.

"This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises.

"It is ordered that the judgment of the lower court be and the same is hereby affirmed.

"It is further ordered, adjudged and decreed that the appellee

herein do have and recover of and from the appellants, R. Allyn Lewis and Laetitia M. Lewis, and their sureties on their appeal bond the cost of his appeal.

Title XII. Chapter "Conveyances," paragraph 725 Revised Statutes of Arizona, 1901, provides:

"Every deed or conveyance of real estate must be signed by the grantor and must be acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

Title XXX. Chapter "Frauds and Fraudulent Conveyances," paragraph 2698 Revised Statutes of Arizona, 1901, provides:

"Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this territory, subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

An appeal from said judgment of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States
47 by the said R. Allyn Lewis and Laetitia M. Lewis having been allowed and perfected, the Supreme Court of the Territory of Arizona makes up, allows and submits the foregoing as its statement of the facts of the case in the nature of a special verdict on appeal to the Supreme Court of the United States.

Dated, the 28th day of May, 1906.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

[Endorsed:] No. 955. In the Supreme Court of the Territory of Arizona. R. Allyn Lewis and Laetitia M. Lewis, Appellants *vs.* Fred Herrera, Receiver for the International Bank in Nogales, a corporation, Appellee. Statement of Facts. Filed May 28, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

48 *Assignment of Errors on Appeal to the Supreme Court of the United States.*

In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Appellee.

The appellants, R. Allyn Lewis and Laetitia M. Lewis, pray an appeal from the final judgment and decree in this court to the Supreme Court of the United States and assign for error:

1. That the Supreme Court of the Territory of Arizona erred in affirming the judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa;

2. The court erred in holding that upon the agreed statement of facts which were adopted as the findings of the district court, as also the findings of the Supreme Court, the transfer of property by the deed executed in Germany in August, 1903, by R. Allyn Lewis to his wife Laetitia M. Lewis did not carry immediately the whole title to the premises; and in holding that until the same was ac-
49 knowledged and recorded it was a legal fraud upon the creditors of the husband arising and becoming such creditors after the signing and delivery of the deed and before its acknowledgment.

3. The court erred in holding that the transfer of title under the findings of fact was in controvention of paragraph 2698 of the Revised Statutes of Arizona, 1901; and that such transfer was void as to the International Bank in Nogales;

4. The court erred in not reversing the judgment of the District Court of Maricopa county upon the statement of facts and in not ordering the District Court to render its judgment on the agreed statement of facts dismissing plaintiff's complaint, as the facts in said statement clearly showed and was found by the court as a fact that there was no actual fraud, nor any legal fraud in such transfer, and that it did not come in controvention of any statute of the territory of Arizona;

5. The court erred in not holding that the International Bank in Nogales, at the time each and both of the deeds were signed, delivered, acknowledged and recorded, was not a creditor of R. Allyn Lewis to be affected by such transfers of property.

6. The court erred in not holding that the International Bank in Nogales was not a creditor of R. Allyn Lewis to be affected by any transfer of his before the 23d day of June, 1904, at which date said bank recovered judgment from said R. Allyn Lewis in the District Court of the First Judicial District of the Territory of Ari-
50 zona, in and for the County of Santa Cruz, for the sum of $5371.37.

7. That this court erred in holding that the District Court erred in adjudging and decreeing that the conveyances and each of them be set aside and to be void and of no effect as against the plaintiff Fred Herrera, Receiver, and as against the levy of and sale under execution under the judgment of the District Court of the First Judicial District of Santa Cruz county against defendant R. Allyn Lewis in the sum of $5371.37 and costs, of date June 23, 1904.

Wherefore, appellants pray that the judgment of the Supreme Court of the Territory of Arizona be reversed.

STREET & ALEXANDER,
Attorneys for Appellants.

(Endorsed:) No. 955. In the Supreme Court of the Territory of Arizona. R. Allyn Lewis and Laetitia M. Lewis, Appellants, *vs.*

Fred Herrera, Receiver for the International Bank in Nogales, a corporation, Appellee. Assignment of Errors on Appeal to Supreme Court of the United States. Filed May 28, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

51 In the Supreme Court of the United States.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank in Nogales, a Corporation, Appellee.

Know all men by these presents, That we, R. Allyn Lewis and Laetitia M. Lewis, as principals, and National Surety Company, (a corporation) *for* New York, as sureties, are held and firmly bound unto Fred Herrera, Receiver of the International Bank in Nogales, a corporation, in the full and just sum of One Thousand dollars, to be paid to the said Fred Herrera, Receiver, his attorneys, executors, administrators, assigns or successors; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th day of May, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at the Supreme Court of the Territory of Arizona, on the — day of ——, in an action depending in said court on appeal from the District Court of the Third Judicial District of
52 the Territory of Arizona, in and for the County of Maricopa, between Fred Herrera, Receiver of the International Bank in Nogales, a corporation, plaintiff, and R. Allyn Lewis and Laetitia M. Lewis, defendants, wherein the said R. Allyn Lewis and Laetitia M. Lewis were appellants and Fred Herrera, Receiver of the International Bank in Nogales, a corporation, was appellee, and judgment of affirmance was rendered against the said appellants, R. Allyn Lewis and Laetitia M. Lewis, in favor of said appellee, Fred Herrera, Receiver of the International Bank in Nogales, a corporation, and the said R. Allyn Lewis and Laetitia M. Lewis having obtained an appeal from said judgment to the Supreme Court of the United States to reverse the judgment of affirmance of the Supreme Court of the Territory of Arizona, and a citation having been issued directed to the said Fred Herrera, Receiver of the International Bank in Nogales, a corporation, citing and admonishing him to be and appear at a session of the Supreme Court of the United States holden at the city of Washington, within sixty days of the date of citation, to-wit, on the — day of ——, 1906.

Now, the condition of the above obligation is such that if the said R. Allyn Lewis and Laetitia M. Lewis shall prosecute their appeal to effect and answer all damages and costs if they fail to make their ap-

peal good, then the above obligation to be void, else to remain in full force and virtue.

R. ALLYN LEWIS. [SEAL.]
LAETITIA McD. LEWIS. [SEAL.]
53 NATIONAL SURETY COMPANY, [SEAL.]
[Corporation Seal.]
By H. I. LATHAM, *Attorney in Fact.*
By WEBSTER STREET, *Att'y in Fact.* [SEAL.]

This bond approved this 28th day of May, A. D. 1906.
RICHARD E. SLOAN,
Associate Justice Supreme Court, Territory of Arizona.

(Endorsed:) No. 955. In the Supreme Court of the United States. R. Allyn Lewis and Laetitia M. Lewis, Appellants, *vs.* Fred Herrera, Receiver of the International Bank in Nogales, a corporation, Appellee. Bond on Appeal. Filed May 28, 1906, S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

54 In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank of Nogales, a Corporation, Appellee.

Affidavit of Value.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Webster Street, being duly sworn, deposes and says that he is one of the attorneys for the appellants, R. Allyn Lewis and Laetitia M. Lewis, and is familiar with the values of the property in dispute; that he makes this affidavit of value for and on behalf of said appellants, for the reason that they are absent from the territory; that he is well acquainted with the property that is the subject of the action and knows the value thereof and that the same exceeds the sum of Five Thousand Dollars, exclusive of costs; that the record on appeal to the Supreme Court of the United States shows that the property, the transfers of which are sought to be set aside, are of the value of at least Fourteen Thousand Dollars and the judgment sought to be levied upon said property is of the amount of $5371.37, together with interest thereon and costs of said action.

WEBSTER STREET.

55 Subscribed and sworn to before me this 2nd day of June, 1906.

[NOTARIAL SEAL.] O. E. SCHUPP.

(Endorsed:) No. 955. Supreme Court, Territory of Arizona. R. Allyn Lewis *et al. vs.* Fred Herrera. Affidavit of Value. Filed June 2, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

56 In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank of Nogales, a Corporation, Appellee.

Supersedeas Bond.

Know all men by these presents, that we, R. Allyn Lewis and Laetitia M. Lewis, as Principals, and National Surety Company of New York, a corporation, as Sureties, are held and firmly bound to Fred Herrera, Receiver of the International Bank of Nogales, a corporation, in the sum of Two Thousand Dollars, the payment of which we and each of us bind our heirs, executors, administrators and successors, firmly by these presents.

Sealed with our seals and dated this 11th day of June, 1906.

The Condition of this obligation is such, Whereas the said R. Allyn Lewis and Laetitia M. Lewis, as Principals, have appealed to the Supreme Court of the United States from the Supreme Court of the Territory of Arizona, from a judgment entered in said court affirming the judgment of the District Court of the Third Judicial District in and for the County of Maricopa, entered the 26th day of September, A. D. 1905, in favor of the appellee, Fred Her-
57 rera, Receiver of the International Bank of Nogales, a corporation, in which it was adjudged that certain conveyances be set aside and held, adjudged and decreed to be void and of no effect as against said Fred Herrera, Receiver, and against the levy and sale under execution under a judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, against the said R. Allyn Lewis for the sum of $5371.37, and the said appellants, R. Allyn Lewis and Laetitia M. Lewis have obtained a stay of the judgment of the Supreme Court of the Territory of Arizona, and the judgment of the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa in said cause, by order of the Supreme Court of the Territory of Arizona, upon the appellants filing their supersedeas bond in the sum of Two Thousand Dollars.

Now, if said appellants prosecute their appeal to the Supreme Court of the United States to effect and pay all costs and damages by reason of the stay of said execution to the said Fred Herrera, Receiver of the International Bank of Nogales, appellee, then this obligation to be void, otherwise, to remain in full force and virtue.

R. ALLYN LEWIS. [SEAL.]
LAETITIA McD. LEWIS. [SEAL.]
NATIONAL SURETY COMPANY. [SEAL.]
[Corporation Seal.]
By H. I. LATHAM, *Attorney in Fact.* [SEAL.]
By WEBSTER STREET, *Att'y in Fact.* [SEAL.]

58 The within bond is approved this 12th day of June, 1906.

RICHARD E. SLOAN,
Associate Justice Supreme Court, Territory of Arizona.

(Endorsed:) No. 955. Supreme Court, Territory of Arizona. R. Allyn Lewis *et al. vs.* Fred Herrera. Supersedeas Bond. Filed June 13, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

59 In the Supreme Court of the Territory of Arizona.

R. ALLYN LEWIS and LAETITIA McD. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver of the International Bank of Nogales, a Corporation, Appellee.

Be it remembered that heretofore and on to-wit the 9th day of January A. D., 1906, the same being one of the regular juridical days of the January Term, A. D., 1906, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS ET AL., Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

On motion of Webster Street, Esq., attorney for appellants herein, it is ordered that this cause be set for oral argument January 22nd, 1906.

And afterwards and upon to-wit the 22nd day of January, A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which
60 said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS ET AL., Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

This cause coming on for hearing was argued by Webster Street, Esq., for Appellants and Selim M. Franklin, Esq., for Appellee, and cause ordered submitted.

And afterwards and upon to-wit, the 30th day of March, A. D. 1906, the same being one of the regular juridical days of the January Term, A. D., 1906, of said Court, the following order and judgment,

inter alia, was had and entered of record in said court in said cause, which said order and judgment is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

This cause having been heretofore submitted and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the lower court be and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the ap-
61 pellee herein, do have and recover of and from R. Allyn Lewis and Laetitia McD. Lewis, appellants herein, and the National Surety Company of New York, a corporation, his costs in this court, taxed at — Dollars, and his costs in the court below in this cause incurred.

And afterwards and upon to-wit the 12th day of May A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia,* was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS ET AL., Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellants, be submitted.

And afterwards and upon to-wit the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS and LAETITIA McD. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

62 It is ordered that the Motion for Re-hearing, filed herein by Appellants and heretofore submitted, be and the same is, hereby denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS and LAETITIA McD. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

Comes now Mr. Jos. L. B. Alexander, for Appellants herein, in open court, and gives notice of Appeal from the judgment of this court to the Supreme Court of the United States, and moves the Court that the appeal be allowed.

It is ordered that said motion be granted and the appeal be and the same is, hereby allowed.

And afterwards and upon to-wit the 28th day of May A. D., 1906, the same being one of the regular juridical days of the January Term, A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

63

No. 955.

R. ALLYN LEWIS ET AL., Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

On motion of Mr. Webster Street, attorney for appellants herein, it is ordered that he be granted leave to file Supersedeas Bond.

It is further ordered that the amount of the Supersedeas Bond be fixed later.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 955.

R. ALLYN LEWIS ET AL., Appellants,
vs.
FRED HERRERA, Receiver, Appellee.

It is ordered that the amount of the Supersedeas Bond in this cause be fixed in the sum of Two Thousand ($2,000.) Dollars.

64 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing pages, numbered from 1 to 63 inclusive, to be full, true and correct copies of the Complaint, Amended Answer of R. Allyn Lewis, Amended Answer of Laetitia McD. Lewis, Opinion, Motion for Re-hearing, Allowance of Appeal, Statement of Facts, Assignment of Errors, Bond on Appeal, Affidavit of Value, Supersedeas Bond, and all orders and proceedings of said court, in the case of R. Allyn Lewis and Laetitia McD. Lewis, Appellants, against Fred Herrera, Receiver of the International Bank of Nogales, a corporation, Appellee, as the same remain of record and on file in my office.

I further certify that the Citation attached hereunto is the original Citation issued by said Supreme Court of the Territory of Arizona, in said above entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona. this 24th day of July, A. D., 1906.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER, *Deputy.*

65 *Citation to Appellee.*

In the Supreme Court of the United States.

R. ALLYN LEWIS and LAETITIA M. LEWIS, Appellants,
vs.
FRED HERRERA, Receiver for the International Bank in Nogales, a Corporation, Appellee.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Fred Herrera, Receiver of the International Bank in Nogales, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the city of Washington within

sixty days from date of this writ pursuant to an appeal duly allowed by the Supreme Court of the Territory of Arizona, and filed in the clerk's office of said court on the 28th day of May A. D. 1906: In a case wherein R. Allyn Lewis and Laetitia M. Lewis are appellants and you are appellee, to show cause if any, why the judgment and decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June A. D. 1906.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

66 Service of a copy of the within citation is hereby admitted this 18th day of June, 1906.

SELIM M. FRANKLIN,
Attorney for Appellee.

67 [Endorsed:] No. 955. In the Supreme Court of the United States. R. Allyn Lewis and Laetitia M. Lewis, Appellants, *vs.* Fred Herrera, Receiver for the International Bank in Nogales, a corporation, Appellee. Citation to Appellee. Filed June 19, 1906. Shelby M. Cullom, Clerk. By Angie B. Parker, Deputy.

Endorsed on cover: File No. 20,327. Arizona Ty. supreme court. Term No. 362. R. Allyn Lewis and Laetitia M. Lewis, appellants, *vs.* Fred. Herrera, receiver of the International Bank in Nogales. Filed August 8, 1906. File No. 20,327.

FILED.
NOV 12 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 79.

R. ALLYN LEWIS AND LÆTITIA M. LEWIS,
APPELLANTS,

vs.

FRED HERRERA, RECEIVER FOR THE INTERNATIONAL BANK IN NOGALES, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

WEBSTER STREET,
J. L. B. ALEXANDER,
Attorneys for Appellants.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28637

(20,327.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 79.

R. ALLYN LEWIS AND LÆTITIA M. LEWIS,
APPELLANTS,

vs.

FRED HERRERA, RECEIVER FOR THE INTERNATIONAL BANK IN NOGALES, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

Statement.

This case was tried upon an agreed statement of facts, which is set out in full in Transcript of Record, at pages 15-27, folios 30-48, inclusive.

By that statement the court was asked to apply the law to the facts thus found and submitted by the parties, and to render judgment thereon; and the court did so render judgment on such statement of facts.

The agreed statement of facts shows briefly that appellants are husband and wife; that the husband gave their home and some town lots in Phœnix, Arizona, to his wife, to become her separate property, and in August, 1903, signed and de-

livered to her a deed therefor, while both were in Germany; that afterwards, in December, 1903, and after they had both returned to New York, he made a confirmatory deed for the lands and premises included in the first deed, and in January, 1904, he executed, acknowledged, and delivered to her said deed, as well as acknowledging the former deed, and both deeds were recorded in Maricopa county, Arizona, on the 6th day of January, 1904; that at that time the husband, R. Allyn Lewis, was solvent, and had money in bank to the amount of about $40,000; that the transfer was *bona fide*, without any intention at all to commit a fraud upon the International Bank in Nogales or upon any one else, but the purpose of the deed was to allow the wife to hold the same as her separate property and as a gift from her said husband; that after the first deed was signed and delivered, in January, and before it and the second deed were acknowledged, the husband, R. Allyn Lewis, had dealings with the International Bank in Nogales; which said dealings afterwards, by the judgment of the District Court of Santa Cruz County, Arizona, on the 23d day of June, 1904, became a judgment debt in the sum of $5,216.81.

The present action was brought in Maricopa county, Arizona, by the receiver of the International Bank in Nogales, to set aside said transfer from husband to wife and allow execution of said judgment in favor of Herrera, who then was the receiver of said International Bank in Nogales. It was admitted that there was no fraud or attempt at fraud in the transfer.

The District Court of Maricopa County rendered judgment for Herrera, receiver, upon the statement of facts submitted; which judgment set aside the said deeds and allowed execution of the judgment in favor of Herrera, receiver of the International Bank in Nogales, upon the said property theretofore conveyed by the husband to the wife under the agreement; that the deed conveyed no title between the husband and the wife until such conveyance was acknowledged, and that such conveyance was void as to creditors becoming such

after signing and delivering the deed and prior to the acknowledgment thereof.

Such cause to set aside the transfers was tried in the District Court of Maricopa County, Arizona, and was appealed by the defendants to said action, R. Allyn Lewis and Lætitia M. Lewis, to the Supreme Court of the Territory of Arizona; and upon the affirmance of said judgment by the Supreme Court of the Territory of Arizona said appellants, R. Allyn Lewis and Lætitia M. Lewis, again appealed to the Supreme Court of the United States and filed their assignment of errors (see Transcript of Record, folios 48 to 50, inclusive), which are as follows, to wit:

Assignment of Errors on Appeal to the Supreme Court of the United States.

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

R. Allyn Lewis and Lætitia M. Lewis, *Appellants,*

vs.

Fred Herrera, *Receiver for the International Bank in Nogales, a Corporation, Appellee.*

The appellants, R. Allyn Lewis and Lætitia M. Lewis, pray an appeal from the final judgment and decree in this court to the Supreme Court of the United States, and assign for error:

1. The Supreme Court of the Territory of Arizona erred in affirming the judgment of the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

2. The court erred in holding that upon the agreed statement of facts which were adopted as the findings of the district court, as also the findings of the Supreme Court, the transfer of property by the deed executed in Germany in August, 1903, by R. Allyn Lewis to his wife, Lætitia M. Lewis, did not carry immediately the whole title to the premises, and in holding that until the same was acknowledged and recorded it was a legal fraud upon the creditors of the husband arising and becoming such creditors after the signing and delivery of the deed and before its acknowledgment.

3. The court erred in holding that the transfer of title under the findings of fact was in contravention of paragraph 2698 of the Revised Statutes of Arizona, 1901, and that such transfer was void as to the International Bank in Nogales.

4. The court erred in not reversing the judgment of the District Court of Maricopa County upon the statement of facts and in not ordering the District Court to render its judgment on the agreed statement of facts dismissing plaintiff's complaint, as the facts in said statement clearly showed, and it was found by the court as a fact, that there was no actual fraud, nor any legal fraud, in such transfer, and that it did not come in contravention of any statute of the Territory of Arizona.

5. The court erred in not holding that the International Bank in Nogales, at the time each and both of the deeds were signed, delivered, acknowledged, and recorded, was not a creditor of R. Allyn Lewis to be affected by such transfers of property.

6. The court erred in not holding that the International Bank in Nogales was not a creditor of R. Allyn Lewis to be affected by any transfer of his before the 23d day of June, 1904, at which date said bank recovered judgment from said

R. Allyn Lewis in the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz for the sum of $5,371.37.

7. That this court erred in holding that the District Court erred in adjudging and decreeing that the conveyances and each of them be set aside and to be void and of no effect as against the plaintiff, Fred Herrera, receiver, and as against the levy of and sale under execution under the judgment of the District Court of the First Judicial District of Santa Cruz County against defendant R. Allyn Lewis in the sum of $5,371.37 and costs, of date June 23, 1904.

Wherefore appellants pray that the judgment of the Supreme Court of the Territory of Arizona be reversed.

STREET & ALEXANDER,
Attorneys for Appellants.

ARGUMENT.

I.

By a reading of the transcript on appeal from the Supreme Court of the Territory of Arizona and the statement of facts in the nature of a special verdict by the Supreme Court of that Territory for the purposes of appeal to the Supreme Court of the United States, and by the decision of the Supreme Court of the Territory of Arizona and the opinion by the judge rendering the opinion, it will become apparent that all the facts in the case are admitted, and that the only matter to be reviewed is the correctness of the judgment of the Supreme Court on the admitted facts.

By the statement of facts it will be seen that R. Allyn Lewis and Lætitia M. Lewis are husband and wife; that while they were such, in perfect good faith with each other and with all the world, and without in fact intending to commit

a fraud on anybody, but with perfect right to do so, the said R. Allyn Lewis, as husband, on August 25, 1903, while they were visiting in Germany, signed and delivered to his wife a deed of gift conveying to her certain real property in Phœnix, Arizona. The deed was not acknowledged until January 9, 1904, after their return to the United States, and the only question is the construction of paragraph 725 of Title XII, Arizona Statutes, 1901, which reads:

> "Every deed of conveyance of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

It is contended by appellee, and is held by the Supreme Court of the Territory of Arizona, that the deeds did not carry immediately the whole title to the premises, and held that until the deeds were acknowledged and recorded it was a legal fraud upon the creditors of the husband arising and becoming such creditors after the signing and delivering of the deed and before the acknowledgment.

In the opinion of the judge who wrote the decision in the Supreme Court of Arizona, it is stated that—

> "There is but one question presented in this case, and that is the operative effect of the deed from Lewis to his wife, dated August 25, 1903, as against the bank, to which he became indebted in November following."

The contention of the appellee herein is that under the laws of Arizona no conveyance of real property is valid as to *third* persons unless it is signed by the grantor and duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration. With this contention of appellee's counsel appellants take issue, and deny that a deed becomes operative *only* when it is acknowledged. In this connection appellee's counsel

would be compelled to maintain as law that the acknowledgment was a part of the instrument. Such is not the law. The acknowledgment to a deed is of statutory origin and was unknown to the common law. It relates only to the proof of execution and not to the force of the deed, nor is it an essential part of the deed. The title to property passes immediately upon the signing and delivery of the instrument, and between the grantor and grantee is as valid without acknowledgment as with one, and there is no necessity for an acknowledgment as between the parties. The grantor cannot be heard to question the validity of the deed on the ground that it was not acknowledged by him or proved at the time of its delivery, nor can it be claimed that the lack of such acknowledgment was a fraud upon his part. These rules are too well settled and decisions upon them are too harmonious to permit of discussion. Statutes, however, for the purpose of making easy proof of execution of deeds have been passed requiring acknowledgments to instruments of conveyance; but such statutes are in the interests of subsequent grantees or creditors, encumbrancers, &c. Some States have passed statutes requiring all instruments before they become operative in any way to be completed by acknowledgment, and where such statutes exist they become a part and portion of the potentiality of the deed, but no such statute exists or ever has existed in Arizona and a common-law deed is effectual as a conveyance.

The courts of other States have said that the acknowledgment was not a part of the deed; and a very conclusive decision, binding on the courts of Arizona, is from the Supreme Court of the United States, found in the case of Sicards, lessee, *vs.* Davis, 6 Peters, 124. The decision was made by Marshall upon the following statute of Kentucky:

> "That no estate of inheritance or freehold or for a term of more than five years in lands or tenements shall be conveyed from one to another unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a pur-

chaser for a valuable consideration not having notice thereof, or any creditor *unless the same writing* be acknowledged by the party or parties who shall have sealed and delivered it or be proved by three witnesses to be his or their act, in the office of the clerk," etc.

Marshall, in interpreting the statute, said:

"This act reduces into one the laws previously existing on this subject. It does not create a right to convey property which any individual may possess, but restrains that right by certain rules which it prescribes and which are deemed necessary for the public security. The original right to transfer property remains unimpaired, except so far as it is abridged by the statute. How far does the statute restrain an individual in the exercise of this general original right? The words are 'that no estate of inheritance, etc., in the lands or tenements shall be conveyed from one to another unless the conveyance be declared by writing, sealed and delivered.' The only requisites, then, to a valid conveyance of an inheritance in lands are, that it shall be in writing and shall be sealed and delivered. The acknowledgment or the proof which may authorize the admission of the deed to record, and the recording thereof, are the provisions which the law makes for the security of creditors and purchasers. They are essential to the validity of the deed, as to persons of that description, not as to the grantor. His estate passes out of him and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged and attested and proved by three subscribing witnesses and recorded in the proper court. In a suit between them, such a deed is completely executed and would be conclusive, although never admitted to record nor attested by any subscribing witnesses. Proof of sealing and delivery would alone be required, and the acknowledgment of the fact by the party would be sufficient proof of it."

Paragraph 220 of the Revised Statutes of 1887 of Arizona, which was changed into paragraph 725 in the revision of said statutes in 1901, was copied from article 630 of the Statutes of Texas, after that statute had had a construction by the Supreme Court of Texas as to its effect upon instruments of conveyance, holding that an instrument of conveyance without acknowledgment was as much of a deed between grantor and grantee as though it were accompanied by an acknowledgment.

In the case of McLain *vs.* Canales, reported in 25 S. W., pages 29-30, the court said, in speaking of that law:

> "The first assignment of error is that the court erred in permitting the grantee, Clanentia Canales, to prove by her own testimony the execution of the deed to her dated in 1870. The propositions under this assignment are: First, that a valid conveyance of land must be subscribed before two credible witnesses or be properly acknowledged, and it is not competent to prove its execution by the testimony of the grantee in lieu of the proof required by law; second, a deed to land made without subscribing witnesses, or not acknowledged, if not absolutely void, can be established only in a direct proceeding against the grantor and cannot be asserted collaterally. The propositions are not sound. A deed without witnesses or acknowledgment is sufficient to convey land, those formalities being requisite only with respect to registration and notice."

Again, in the case of Frank *vs.* Frank, reported in the same volume, page 819, the same court said, in reference to the same matter:

> "The complaint of the court's charge, in that it authorized a recovery in behalf of appellee in case the jury found that her husband signed but did not acknowledge the deed, is not well taken; for it was not necessary to the validity of the deed that he should have acknowledged it."

Again, the same court, in Kimmarle *vs.* Houston & T. C. Ry. Co., 12 S. W., 698-700, said:

> "The only ground of objection to the admission of the deed of trust, to which the second assignment relates, was that it had not been acknowledged or proven for record; and the same ground of objection was urged against the admission of the instrument referred to in the third assignment of error. The acknowledgment or proof of execution was not necessary to give effect to these instruments. By the thirty-fifth section of the act of December, 1871, which was re-enacted in April, 1874, the acknowledgment or proof of execution of a conveyance by a corporation was made necessary before such conveyance could be admitted to record—just as such acknowledgment or proof of execution is required before a conveyance of a natural person can be recorded; but this does not affect the validity of the conveyance, the execution of which may be proven otherwise than by the officer's certificate that the grantor has acknowledged its execution, or that its execution has been proven by the subscribing witness, in the manner prescribed by the statute."

Again, the same court, in 34 Tex., pages 442-443-452, repeats the same condition of their statute. On page 443 it is recorded:

> "That the fortieth section of the registry law declares 'that no deed of conveyance, lien or other instrument of writing shall take effect as regards the rights and interests of third persons until the same shall have been duly proven and presented to the court as required by this act for the recording of land titles.'"

And the court said:

> "The deed from Gafford to Steel divested Gafford of all the title he had in the land which was conveyed by it, and, although the deed was never recorded, he had no fee remaining in the land and none could

descend to his heirs at his death; and the subsequent purchaser from the heirs could acquire no further or other interest in the land than was possessed by his grantors. It follows that the deed from the heirs of Gafford to the appellant, Rogers, conveyed nothing, for they had nothing to convey."

The Supreme Court of Texas, in reviewing its decisions upon the statute in the case of Corgell vs. Holmes, reported in volume II of Posey's Unreported Cases, says:

> "From an examination of these provisions of the statutes we think these conclusions fairly deducible: First, that at that date any instrument in writing purporting to convey lands, sealed or delivered or using a scroll for a seal and recognizing it to be used as such in the body of the instrument, was a valid conveyance of lands, good against the grantor and his heirs, and against purchasers for valuable consideration who have notice thereof, whether registered or not. Second, that no witnesses were necessary to give validity to the same as a conveyance at common law, and under the statute of uses the common-law forms of conveyance, of feoffment, gift, grant, lease and release, and bargain and sale, witnesses were not necessary to any of these forms of conveyance."

And cites a number of cases, common law and otherwise, and lastly Greenleaf's Cruise on Real Property.

Colorado holds to the same rule in the case of Holliday *vs.* Daly, 1 Colo., 460-467, and says:

> "As to the other questions which have been argued, we think that the conveyance of the attorney under which the defendant derives title was well enough executed, and that whether it was acknowledged in conformity with the statute or not is a matter of indifference, for the acknowledgment is but a means of proving the execution and authenticating the record when the instrument shall be thereafter recorded, and the statute which requires it being in the affirmative and without any negative implication to exclude the common law the conveyance will be valid as between

> the parties thereto and those having notice thereof, even though not acknowledged at all."

The first volume of Cyclopædia, pages 514-515, under the head of "Acknowledgments," in the statement, has this to say:

> "That in the absence of any statutory provision making the acknowledgment an essential part of the instrument, the title passes immediately upon the execution and delivery of the instrument; and as against the grantor, his heirs and devisees, such instrument is as valid without acknowledgment as with one. In other words, there is no necessity for acknowledgment as between the parties. The grantor will not be heard to question the validity of the conveyance on the ground that it was not acknowledged by him or proved at the time of its delivery, and the contract may be enforced against him and on his death against his administrators in preference to his general creditors."

The work cites the following States as holding that doctrine: Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, United States, and the only jurisdiction which holds the contrary rule is the State of Alabama, so far as the research of counsel for appellants can ascertain.

The citations for Missouri which we make are:

58 Mo., 468;

82 Mo., 448;

which under the following statute, section 2401, Revised Statutes, 1879, Missouri:

> "All deeds or other conveyances of land or of any estate therein shall be subscribed and sealed by the parties granting the same, or by any lawful agent, and

shall be acknowledged or proved and certified in the manner herein prescribed"

have held that deeds without acknowledgment are good between the parties and those having notice.

Maine, in 80 Me., 36, has held in the same way.

See also 1 Ency. of Law (2 ed.), 488.

II.

Paragraphs 2697-2698 of Arizona Statutes, being sections 2 and 3 of Title XXX, "Frauds and Fraudulent Conveyances," of Statutes of 1901, reads as follows:

> 2697, SEC. 2. "Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, any suit commenced, or decree, judgment or execution suffered or obtained, and any bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchaser or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."
>
> 2698, SEC. 3. "Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this Territory, subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

Counsel for appellee insists that, under paragraphs 2697 and 2698, the deed from Lewis to his wife, of August 25,

1903, is not effective as to the appellee, for the reason that the same was not acknowledged and recorded until after the indebtedness was incurred upon which his judgment is based and upon which he seeks to set said conveyance aside.

Appellants contend that paragraph 2697 has no application in this case, for the reason that said paragraph only applies to cases where the gift or conveyance is made with intent to delay, hinder, or defraud creditors, or purchasers, or other persons of or from what they are or may be lawfully entitled to; and in this case the agreed statement of facts admit that there was no international fraud whatsoever in the conveyance from Lewis to his wife of the property in question at the time he transferred the same, on August 25, 1903. In other words, before paragraph 2697 can become applicable in this case, the appellee would have been compelled to show fraud in fact and not fraud in law, for paragraph 2707 of the same title of the statute provides:

> "The question of fraudulent intent in all cases arising under the provisions of this title shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely that it was not founded on a valuable consideration."

This last paragraph was taken from the State of California, and when it was incorporated in our Code the Supreme Court of California had given it a construction; and since its incorporation in our statute the Supreme Court of Arizona has also given it a construction in keeping with the construction given it by the Supreme Court of California.

Windhouse *vs.* Boots, 28 Pac., 557.
Thelkel *vs.* Scott, 26 Pac., 879.
Emmons *vs.* Barton, 42 Pac., 305.
Hall *vs.* Warren, 5 Ariz., 127-134.

Therefore it is quite clear that paragraph 2697 has no application in this case whatsoever.

As to paragraph 2698, urged by the appellee, which provides that—

> "Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors unless it appears that such debtor was then possessed of property within this Territory subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

It has been the declaration of appellee's counsel that they were relying on legal fraud instead of fraudulent intent; that whatever fraud existed was that which the statute raised independent of the will, the wish, or the intention of the parties.

The word appearing in the paragraph which is of most consequence to this argument is the word "prior" preceding the word "creditors." We say that the paragraph can have no application to the facts agreed upon as the statement of facts in this case. It is not claimed in the agreed statement of facts that the appellee was in any way a creditor before November 14, 1903, and again on December 15, 1903; nor is it claimed that before that time any action or transaction between the appellee and the appellant R. Allyn Lewis took place, happened, or transpired by which the International Bank in Nogales could become a creditor. It is also agreed that the date of the instrument of conveyance from R. Allyn Lewis to his wife, Laetitia M. Lewis, which the appellee in this action seeks to have set aside, was August 25, 1903; so if it be a fact that the conveyance became a legal instrument of conveyance August 25, 1903, then the International Bank in Nogales could not be a prior creditor, for admittedly it did not become a creditor until in November and December following.

Appellee contends that there was no conveyance at all—that is, that the instrument made and signed by the appellant R. Allyn Lewis at Cologne, Germany, on the 25th day of August, 1903, and then delivered to the appellant Lætitia M. Lewis did not become a conveyance of the property until it was executed and recorded in January, 1904, and that before it was acknowledged and recorded the International Bank in Nogales became a creditor, to wit, November and December, 1903, and therefore was a prior creditor before the consummation of the conveyance. In this contention they would be compelled to have maintained as law that the acknowledgment was a part of the instrument. Such is not the law and, without the aid of express statute, never was the law.

That paragraph 2698, as well as the whole title on "Fraudulent Conveyances" contained in the Revised Statutes of 1887, was taken from the statutes of Texas, except paragraph 2707, which was taken from the State of California. This title on "Fraudulent Conveyances" was carried into the Revised Statutes of 1901 with additional provisions.

The Supreme Court of Texas had given paragraph 2698 a construction prior to its adoption, in 1887, by this Territory, holding that no *third* party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made or was a subsequent purchaser without notice.

Garcia *vs.* Galvan, 55 Tex., 53.
Cole *vs.* Terrel, 9 S. W., 668; 71 Tex., 556.
Willis & Bro. *vs.* Smith, 65 Tex., 656.
Lewis *vs.* Simmons, 72 Tex., 470.

The agreed statement of facts in this case show that the appellee in this case is neither a prior *creditor* nor a subsequent *purchaser*, but that he is a subsequent creditor; and under the authority last above quoted a subsequent creditor cannot be heard to complain of a voluntary conveyance from

husband to wife from the mere fact that he is a subsequent creditor; but before he can complain and be entitled to have the conveyance set aside, he must show that the conveyance was made with intent to defraud subsequent creditors.

It was said in the case of Cole *vs.* Terrel, 9 S. W., at page 671, *supra*, in construing article 2466 of the Texas statute, of which paragraph 2698 is a copy:

> "It is accordingly well settled that if a party make a conveyance of his property with the express intent to become indebted to another to defraud him of his debt by means of artifice, such subsequent creditor may contest and by proof defeat the transfer, although he was not a creditor of the grantor at the time of the conveyance."

And again:

> "The simple fact of a subsequent indebtedness is not sufficient to make a transfer fraudulent. There must exist at the time on the part of the grantor a fraudulent view, and until this fraudulent purpose is established, either by positive proof or the exhibition of such acts as justify the inference of its actual existence, the conveyance cannot be set aside."

This Texas rule is also supported by the weight of authority.

> Hageman *vs.* Buchannan, 14 Am. St. Rep., 732, and authorities cited in note in same volume, at page 750,

where the rule is laid down that a subsequent indebtedness cannot be invoked to make fraudulent that which was honest and free from impeachment at the time, and that there is no presumption of fraud as to subsequent debt, and a creditor

whose debt is incurred subsequent to the making of a voluntary conveyance must show fraud in fact.

Lewis *vs.* Symons, 72 Tex., 470.
1 L. R. A., 520, note.
24 Kans., 780.
25 Pac., 592.

Before appellants close their brief they want to call the attention of this court to the published assignment of errors, on page 28, folio 50, paragraph 791. The first line should evidently be made to read "this court erred in not holding that the District Court," instead of being, as printed, in holding that "the District Court erred in holding." In other words, the word "not" has evidently been omitted.

Wherefore appellants pray that the judgment be corrected; that the cause of appellees be dismissed, and that the appellants have their costs of suit.

Respectfully submitted,

WEBSTER STREET AND
J. L. B. ALEXANDER,
Attorneys for Appellants,
R. Allyn Lewis and Lætitia M. Lewis.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 79.

R. ALLYN LEWIS AND LAETITIA M. LEWIS, APPELLANTS,

vs.

FRED HERRERA, RECEIVER FOR THE INTERNATIONAL BANK IN NOGALES, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is a suit by a creditor to set aside as void, two deeds executed by the debtor to his wife, and

to have the property therein described subjected to the payment of his judgment.

The case was tried upon an agreed statement of facts. The district court held the deeds to be void as against plaintiff. Defendants appealed to the Supreme Court of Arizona, which affirmed the judgment of the lower court, and from this last judgment defendants have appealed to this court.

The facts briefly are as follows: On August 25, 1903, while appellants, R. Allyn Lewis and Laetitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed conveying to her certain property situate in Phoenix, Maricopa County, Arizona, the consideration being love and affection. The execution of the deed was not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904, when he did acknowledge the same before a Notary in the State of New York. On December 19, 1903, in the State of New York, Lewis signed and delivered to his wife a second deed, conveying to her the same property, but with a more accurate description; the consideration therefor being also love and affection. This second deed was likewise not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904.

After Lewis had signed the first deed, but before he had acknowledged it, and before he had either signed or acknowledged the second deed, to-wit: between November 5, 1903, and December 15, 1903, he became indebted in a large sum to the In-

ternational Bank in Nogales, a bank doing business in Nogales, Arizona, which indebtedness was thereafter reduced to judgment in an action before the district court in Arizona, brought by Fred Herrera, receiver for the bank. Execution was issued under this judgment; it was returned unsatisfied; the judgment is still unpaid; hence this suit to set aside said deeds.

At the time Lewis signed the first deed to his wife, he was solvent and was not indebted to the said bank in any sum whatsoever; but at the time he signed the second deed, and on January 9, 1904, when for the first time, he acknowledged before the notary the execution of both the first and second deeds, he was indebted to said bank, and he was not possessed of property within the Territory of Arizona, subject to execution, sufficient to pay his existing debts.

Appellee contends that, under the statute of Arizona, Par. 725, Revised Statutes of Arizona, 1901, a conveyance of real property is ineffective and void, unless made by an instrument in writing, signed and *acknowledged* by the grantor. That as neither of the deeds signed by Lewis were acknowledged by him until January 9, 1904, neither became effective as conveyances until that day, and as on that day Lewis had already contracted his debt to the bank, and as each deed was a deed of gift and not for a consideration deemed valuable in law, and as it did not appear that on that day he was possessed of property within the Territory of Arizona, subject to

execution, sufficient to pay his debt to the bank, each of said conveyances, under the provisions of Par. 2698, Revised Statutes of Arizona, 1901, was void as to his said prior creditor, the bank.

Par. 2698, Revised Statutes of Arizona, 1901, is as follows:

> "2698. Every gift, conveyance, assignment, "transfer or charge made by a debtor which is "not upon consideration deemed valuable in law "shall be void as to prior creditors, unless it ap- "pear that such debtor was then possessed of "property within this territory, subject to execu- "tion, sufficient to pay his existing debts; but "such gift, conveyance, assignment, transfer or "charge shall not on that account merely be de- "creed to be void as to subsequent creditors or "purchasers."

So that the one and only question in this case is, whether or not, under the provisions of Par. 725 of the Revised Statutes of Arizona, 1901, a deed, which is signed but is not acknowledged, is effective as a conveyance of real property.

Said Par. 725 is as follows:

> "725. Every deed or conveyance of real estate "must be signed by the grantor and must be duly "acknowledged before some officer authorized "to take acknowledgments, and properly certi- "fied to by him for registration."

POINTS AND AUTHORITIES.

A deed or conveyance of real property, to be valid, under the law of Arizona, must be signed *and acknowledged* by the grantor.

> Par. 725, Revised Statutes of Arizona, 1901, *supra.*

This statute has been construed by the Supreme Court of Arizona to mean that the deed or conveyance must be acknowledged by the grantor, as well as signed by him, and that until acknowledged the deed or conveyance is ineffectual to convey title.

> Lewis et ux v. Herrera, 85 Pac. Rep., 245-246.

The construction of this statute by the local court is of great, if not of controlling weight.

> Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of Arizona, 206 U. S., pages 474-482.
>
> Sweeney v. Lomme, 22 Wall., 208;
>
> Northern P. R. Co. v. Hambly, 154 U. S., 349-361;
>
> Fox v. Haarstick, 156 U. S., 674-679.

Similar statutes have been so construed by other courts.

Clark v. Graham, 6 Wheat, 577;

Summers v. White, 71 Fed. (C. C. A.) 106;

Herndon v. White, 52 Ala., 597;

Chadwick v. Carson, 78 Ala., 116;

Carlisle v. Carlisle, 78 Ala., 542;

French v. French, 62 N. H., 234;

Merwin v. Camp, 3 Conn., 35;

Heelan v. Hoagland, 10 Neb. 511;

Hout v. Hout, 20 Ohio St., 124;

Smith v. Hunt, 13 Ohio, 260;

Allston v. Thompson, Cheves (S. C.) 271.

The two deeds from Lewis to his wife were, therefore, not effective as conveyances until January 9, 1904.

On January 9, 1904, Lewis was indebted to the bank; he was not then possessed of property in Arizona sufficient to pay his debts; the deeds were without consideration deemed valuable in law; therefore, as to the bank, a prior creditor, the deeds were void.

Par. 2698, Rev. Stats. of Arizona, 1901, *supra.*

ARGUMENT.

As the second deed from Lewis to his wife was both signed and acknowledged after Lewis became indebted to the bank; as it was a gift and as it did not appear that at the date of signing he was possessed of property in Arizona, subject to execution, sufficient to pay his debts, it is beyond question, that under Par. 2698, Revised Statutes of Arizona, 1901, already quoted in full, that deed was void as to his prior creditor, the bank, and Herrera, its receiver.

The first deed, however, was signed by Lewis before he became so indebted, but, we maintain that, under the statute of Arizona, a deed signed, but not acknowledged, is ineffectual as a conveyance of real property; that this deed did not become effective as a conveyance until it was acknowledged, to-wit, on January 9, 1904, and on that day Lewis was already indebted to the bank, and the deed was void as to it, a prior creditor.

So that the only question in this case is, whether or not, under the statute of Arizona, a deed signed but not acknewledged, is valid as a conveyance of real property.

The statute, Par. 725, Revised Statutes of Arizona, 1901, is as follows:

> "725. Every deed or conveyance of real estate "must be signed by the grantor and must be "duly acknowledged before some officer author- "ized to take acknowledgments, and properly "certified to by him for registration,"

This statute is very clear; very simple. It requires that the deed or conveyance of real estate must be signed, and must be duly acknowledged. The acknowledgment is made by the statute as necessary as the signing. It is as logical to say that under this statute, a deed is valid if not signed by the grantor, as it is to say it is valid if not duly acknowledged by him.

This statute has already been construed by the Supreme Court of Arizona. In the case of Lewis v. Herrera, 85 Pacific Reporter, p. 245-246, that court says:

> "The provisions of paragraph 725, above "cited, seem to us to permit of but one construc- "tion. When it says that every deed and con- "veyance of real estate must be signed by the "grantor and must be duly acknowledged by "some officer authorized to take acknowledg- "ments, it is equivalent to saying that no deed, "unless executed as therein provided will operate "to effect a conveyance of real estate," and it held the deeds void, until acknowledged.

This Honorable court in the case of Northern Pacific R. Co. v. Hambly, *supra,* says:

> "While this construction, given by a su- "preme court of a territory, is not obligatory "upon this court, it is certainly entitled to re- "spectful consideration, and in a doubtful case "might well be accepted as turning the scale in "favor of the doctrine there announced."

In passing upon the validity of a deed under the statute of Ohio, which required a deed to be

signed and sealed by the grantor in the presence of two witnesses and to be acknowledged, this Honorable Court said:

> "Although there are no negative words in "this clause, declaring all deeds for the convey- "ance of lands executed in any other manner to "be void, yet this must be necessarily inferred "from the clause in the absence of all words in- "dicating a different legislative intent, and, in "point of fact, such is understood to be the uni- "form construction of the act in courts of Ohio." And the deed was held to be void.
>
> "Calrk vs. Graham, 6 Wheat, 577."

The same subject was recently (1895) reviewed by the Circuit Court of Appeals, Eighth Circuit, in construing the following statute of Nebraska:

> "Deeds of real estate or any interest there- "in, in this State, except leases for one year or "for a less time, if executed in this State, must be "signed by the grantor or grantors, being of law- "ful age, in the presence of at least one com- "petent witness, who shall subscribe his or her "name as a witness thereto, and be acknowl- "edged or proved and recorded as directed in "this chapter."

This statute was held by the Court to be mandatory; and an assignment of real property, not subscribed by one competent witness, as therein required, was held to be void and to pass no title. Many cases are cited in the opinion in support of this position,

including the case of Clark vs. Graham, *supra*, and Ohio cases.

Summers vs. White, 71 Fed. Rep. 106.

Construing the same statute the Supreme Court of Nebraska has held that a deed of assignment of real property, not acknowledged by the grantor, is void as against the creditors of the grantor.

Heelan vs. Hoagland, 10 Neb., 511 (7 N. W. 282).

To the same effect is Hout vs. Hout, 20 Ohio St., p. 124.

The State of Alabama has a statute similar to ours, and the Supreme Court of that State has uniformly held that a deed not acknowledged is void.

The first case in Alabama is Hendon vs. White, 52 Ala. 597, decided in 1875. For the convenience of the Court, we will quote at some length from that case.

The Court said:

"The code declares conveyances for the "alienation of lands must be attested by one, "or, where the grantor cannot write, by two "witnesses. An acknowledgment of execution, "before an officer authorized to take it, dis- "penses with the necessity of attestation. (R. "C. 1535-6.) By the common law, neither at- "testing witnesses nor an acknowledgment of "execution before a public officer was necessary "to the validity of a deed. These constituted

"only evidence of authenticity, which compelled "a party relying on the deed to proof of a differ- "ent character from that he would otherwise be "required to produce. (Robertson vs. Kennedy, "1 Stew. 245; Dilligham vs. Brown, 38 Ala. "311) Prior to the code this rule of common "law obtained here. * * * * The sec- "tions under consideration can have but one of- "fice to perform in this view. They operate an "abrogation of the common law rule, and sub- "stitute in its stead the essentials of an alienation "of lands. These essentials must be observed, or "the alienation is unauthorized and ineffectual. "They can not be esteemed as providing a mere "cumulative mode of conveyance, for at common "law the mode of conveyance prescribed would "be valid and operative, and would have been "generally observed. As no conveyances are "now in use here which livery of seisin ever at- "tended, the purpose was to require, as indis- "pensible to an alienation of lands, an authenti- "cation of the act partaking of the character of "the conveyance by which it was done; as the "title could pass only by writing, that there must "be witnesses to its execution subscribing in "writing, or an acknowledgement before an of- "ficer of the law authorized to take and certify "it. A safeguard against fraud, perjury, and "clandestine conveyances is thus provided. Such "safeguard is a necessity to the security of "titles."

"In the case of French vs. French (63 N. "H. 234), in which the conveyance was very "similar to that made by Walker to his daugh- "ter, a conveyance founded only on the considera- "tion of love and affection, which was not attest- "ed by two witnesses as required by the statutes

"of that State, was declared invalid as a deed. "A like decision founded on a similar statute "was made by the Supreme Court of Connecti- "cut, in Merwin vs. Camp, 3 Conn. 35. A "statute of Ohio, passed in 1805, declared that "deeds for the conveyance of lands 'shall be "signed and sealed by the grantor, in the pres- "ence of two witnesses, who shall subscribe the "said deed of conveyance, attesting the ac- "knowledgement of the signing and sealing "thereof,' etc. A deed attested by one witness "only, founded on a valuable consideration, was "declared insufficient to pass the legal estate, "and inadmissable as evidence of a conveyance. "Courcier vs. Graham, 1 Ham. (Ohio) 330.) "The Supreme Court of the United States, in "following this decision, was met by the objec- "tion, that as other modes of conveyance than "that prescribed were not expressly prohibited, "the deed should be regarded as valid at com- "mon law. But the Court said: 'Although "there are no negative words in this clause de- "claring all deeds for the conveyance of lands "executed in any other manner to be void; yet "this must be necessarily inferred from the "clause, in the absence of all words indicating a "different legislative intent.' (Clark vs. Graham, "6 Wheat 577, 5 L. Ed. 334.) The Court of "Appeals of South Carolina gave the same con- "struction t oa similar statute of that State. "(Allston vs. Thompson, Cheves' 271.) The "general rule is, that if the statute limits a thing "to be done in a particular form or manner, it "excludes every other mode, and affirmative ex- "pressions introducing a new rule imply a nega- "tive. (Sedgwick on Stat. & Cons. 31) This "rule appears to us to be peculiarly applicable

"to the statutor provisions embodied in a code "intended to supercede, as to the matters em- "braced in it, not only existing statutes, but com- "mon law principles. The instrument intended "as a conveyance to Mrs. Spann, not being at- "tested or acknowledged, was inoperative to pass "to her the legal estate, until its acknowledge- "ment in 1868."

In the case of Chadwick vs. Carson, 78 Ala- 116, the Court said:

"The face date of the mortgage is October "3, 1872. It has no subscribing witnesses, and "remained without the certificate of acknowl- "edgement until January 1, 1873. During that "time, it was entirely inoperative as a convey- "ance. It wanted an indispensible element of "execution, and was of no greater force than a "deed signed but not delivered. (Hendon vs. "White, 52 Ala. 597; Lord vs Fulmer, 57 Ala. "615; Stubbs vs. Kohn, 64 Ala. 187). The "mortgage in this case must be held to have been "executed January 1, 1873, the date which the "certificate of acknowledgement bears."

In the case of Carlisle vs. Carlisle, 78 Ala. 542, the Court said:

"As the title to real estate can pass only "by writing, when not devolved by operation of "law, the purpose of the statutes in prescribing "due andproper solemnities to be observed in the "execution of such conveyance, is to guard the "security of titles, and impart confidence, by "preventing, as far as practicable, fraud, impo- "sition, and clandestine conveyances. The effect "of the statutes is to declare inoperative a con-

"veyance of land executed in any manner other "than substantially as provided, on the settled "general rule, that when the statute limits an act "to be done in a particular form or manner, ev- "ery other mode is excluded."

To the same effect are the following Alabama cases:

Watson vs. Herring, 115 Ala. 217 (22 So. Rep. 28).

Eureka Lumber Co. vs. Brown, 130 Ala. 140 (15 So. Rep. 518).

Caperton vs. Hall, 83 Ala. 171 (3 So. Rep. 234).

Stewart vs. Beard, 29 Ala. 470.

Dugger vs. Collins, 69 Ala. 324.

Ky. Bank vs. Jones, 59 Ala. 123.

Lord vs. Fulmer, 57 Ala. 615.

Appellants contend that paragraph 725 of the Arizona statute was adopted from the statutes of Texas, and that the Texas courts have construed their statute to mean that a deed signed but not acknowledged is effective to convey title..

The answer to this is, that the Arizona statute was not adopted from Texas—it differs essentially from the Texas statute.

The Texas statute, Art. 630, Civil Statutes of Texas, is as follows:

"Every deed or conveyance of real estate "must be signed or acknowledged by the grantor "in the presence of at least two credible subscrib- "ing witnesses thereto; or must be duly acknowl- "edged before some officer authorized to take "acknowledgments, and properly certified to by "him for registration."

The Texas statute requires every deed or conveyance to be signed, *or* acknowledged in the presence of two subscribing witnesses, *or* acknowledged before a proper officer.

The Arizona statute requires a deed to be signed *and* acknowledged before a proper officer.

Paragraph 725 of the Revised Statutes of 1901, is different from Section 220 of the Revised Statutes of Arizona of 1887.

Section 220 of the Revised Statutes of Arizona of 1887, is in the exact language of the Texas statute. It is as follows:

"220. Every deed or conveyance of real "estate must be signed or acknowledged by the "grantor in the presence of at least two credible "subscribing witnesses thereto; or must be duly "acknowledged before some officer authorized "to take acknowledgements, and properly certi- "fied to by him for registration."

But in 1901 the Legislative Assembly of Arizona saw fit to change this statute so as to make both signing *and* acknowlegdment by the grantor essential requirements to the validity of every deed and conveyance.

If the Arizona Statute of 1887, which is the same as the Texas statute, was so ambiguous as to require reconstruction, that ambiguity is eliminated by the statute of 1901. The statute of 1901 is too clear and simple to require construction; it requires that every deed or conveyance must be signed and must be acknowledged. This change in the language of the statute is significant. It was done for a purpose, and that purpose was to make the acknowledgment by the grantor before a proper officer a prerequisite to the validity of the deed, as much as the signing.

At common law a seal was necessary to the validity of a deed. Arizona has, by statute, abolished private seals. Paragraph 4054, Revised Statutes of Arizona, 1901, is as follows:

> "No private seal or scroll shall be neces-
> "sary to the validity of any contract, bond or
> "conveyance whether respecting real or person-
> "al property, or any other instrument of writing
> "whether official, judicial or private, except
> "such as are made by corporations, nor shall the
> "addition or ommission of a seal or scroll in any
> "way effect the force and effect of any of the in-
> "struments mentioned herein, which have been
> "heretofore or which may hereafter be made."

A deed or conveyance of real property in Arizona is not required to be under seal; but, under paragraph 725, of the statute, it must be signed and acknowledged by the grantor. The acknowledgment is an effective substitute for the seal, and a potent preventative of fraud.

The statute in force in Arizona since 1901 is so different from the statute of Texas, that a consideration of the Texas cases is unnecessary.

Appellants may contend that, if the instruments were ineffectual as conveyances, they were enforceable as contracts to convey under paragraph 732, Revised Statutes of Arizona, 1901, which is as follows:

> "When an instrument in writing, which "was intended as a conveyance of real estate, or "some interest therein, shall fail, either in whole "or in part, to take effect as a conveyance by "virtue of the provisions of this title, the same "shall, nevertheless, be valid and effectual as "a contract upon which a conveyance may be en- "forced, so far as the rules of law will permit."

The unacknowledged deed of Lewis to his wife, under the provisions of this section, it might be claimed, was good as a contract upon which a conveyance could be enforced by the wife, so far as the rules of law will permit.

But the deed, being executed without consideration, is not such a contract as can be enforced, because it is well settled that equity will not decree the specific performance of a contract, unless supported by a valuable consideration.

Am. & Eng. Ency. of Law (2d Ed.), vol. 28; p. 25.

Ency. of Plead. & Prac., vol. 18, pp. 786-824.

Again, the right of the wife to enforce the contract is not a question in this case. Before the present suit was brought, Lewis made the proper acknowledgment to each deed. He did all that a court of equity could have forced him to do. And it is these very deeds which subsequently he did properly acknowledge, that we say are void as to the bank and its receiver, because, when duly executed by being acknowledged, Lewis was already indebted to the bank; the bank was then a "prior creditor," and as to a prior creditor, the deeds being gifts and without consideration, were void, it not being made to appear that Lewis was then possessed of property in Arizona sufficient to pay his existing debts.

We respectfully submit the judgment of the lower court should be affirmed.

WILLIAM HERRING,
Attorney for Appellee

LEWIS *v.* HERRERA, RECEIVER OF THE INTERNATIONAL BANK IN NOGALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 79. Submitted December 13, 1907.—Decided February 24, 1908.

The construction of the statute of a Territory by the local courts is of great, if not of controlling, weight; and in this case this court follows the construction given by the Supreme Court of Arizona to Par. 725, Rev. Stat. of Arizona of 1901, to the effect that a deed or conveyance of real property to be valid as against third parties must be signed and acknowledged by the grantor and that until acknowledged it is ineffectual to convey title. 85 Pac. Rep. 245, affirmed.

THE facts are stated in the opinion.

Mr. Webster Street and *Mr. J. L. B. Alexander* for appellants:

Some States have passed statutes requiring all instruments before they become operative in any way to be completed by acknowledgment, and where such statutes exist they become a part and portion of the potentiality of the deed, but no such statute exists or ever has existed in Arizona, and a common law deed is effectual as a conveyance. The courts of other States have said that the acknowledgment is not a part of the deed. See *Sicards* v. *Davis*, 6 Peters, 124.

Paragraph 220, Rev. Stat., Arizona, which was changed into par. 725 in the revision of 1901, was copied from article 630 of the statutes of Texas, after that statute had received a con-

struction by the Supreme Court of Texas as to its effect upon instruments of conveyance, holding that an instrument of conveyance without acknowledgment was as much of a deed between grantor and grantee as though it were accompanied by an acknowledgment. *McLain* v. *Canales*, 25 S. W. Rep. 29, 30; *Frank* v. *Frank*, 25 S. W. Rep. 819; *Kimmarle* v. *Houston & T. C. Ry. Co.*, 12 S. W. Rep. 698, 700; *Rodgers* v. *Burchard*, 34 Texas, 442, 443, 452; *Corgell* v. *Holmes*, Posey's Unreported Cases, Vol. II.

Paragraph 2697 has no application in this case, for the reason that it only applies where the gift or conveyance is made with intent to delay, hinder or defraud creditors, or purchasers, or other persons of or from what they are or may be lawfully entitled to; and in this case the agreed statement of facts admits that there was no intentional fraud.

Under par. 2707, no conveyance is to be deemed fraudulent, solely because not founded on valuable consideration.

This paragraph was taken from the statutes of California, and when it was incorporated in the Code of Arizona, the California courts had construed it; and since its incorporation in our statute the Supreme Court of Arizona has also given it a construction in keeping with the construction given it by the Supreme Court of California. *Windhouse* v. *Boots*, 28 Pac. Rep. 557; *Thelkel* v. *Scott*, 26 Pac. Rep. 879; *Emmons* v. *Barton*, 42 Pac. Rep. 305; *Hall* v. *Warren*, 5 Arizona, 127, 134.

Paragraph 2698, as well as the whole title on "Fraudulent Conveyances" contained in the Revised Statutes of 1887, was taken from the statutes of Texas, except par. 2707, which was taken from the statutes of California. This title on "Fraudulent Conveyances" was carried into the Revised Statutes of 1901 with additional provisions.

See also the construction of par. 2698, by the Supreme Court of Texas prior to its adoption, in 1887, by Arizona, holding that no third party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made or was a subsequent pur-

chaser without notice. *Garcia* v. *Galvan*, 55 Texas, 53; *Cole* v. *Terrel*, 9 S. W. Rep. 668; *S. C.*, 71 Texas, 556; *Willis & Bro.* v. *Smith*, 65 Texas, 656; *Lewis* v. *Simon*, 72 Texas, 470.

The appellee in this case is neither a prior creditor nor a subsequent purchaser, but a subsequent creditor; and under the authorities last cited cannot be heard to complain of a voluntary conveyance from husband to wife from the mere fact that he is a subsequent creditor. Before he can have the conveyance set aside, he must show that the conveyance was made with intent to defraud subsequent creditors. *Cole* v. *Terrel*, 9 S. W. Rep. 671. See also *Hageman* v. *Buchanan*, 14 Am. St. Rep. 732, and *Lewis* v. *Simon*, 72 Texas, 470.

Mr. William Herring for appellee:

A deed or conveyance of real property, to be valid, under the law of Arizona, must be signed and acknowledged by the grantor. Par. 725, Rev. Stat., Arizona, 1901.

This statute has been construed by the Supreme Court of Arizona to mean that the deed or conveyance must be acknowledged by the grantor, as well as signed by him, and that until acknowledged the deed or conveyance is ineffectual to convey title. *Lewis* v. *Herrera*, 85 Pac. Rep. 245, 246.

The construction of this statute by the local court is of great, if not of controlling weight. *Copper Queen Consolidated Mining Company* v. *Territorial Board of Equalization*, 206 U. S. 474, 482; *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349, 361; *Fox* v. *Haarstick*, 156 U. S. 674, 679.

Similar statutes have been so construed by other courts. *Clark* v. *Graham*, 6 Wheat. 577; *Summers* v. *White*, 71 Fed. Rep. 106; *Herndon* v. *White*, 52 Alabama, 597; *Chadwick* v. *Carson*, 78 Alabama, 116; *Carlisle* v. *Carlisle*, 78 Alabama, 542; *French* v. *French*, 62 N. H. 234; *Merwin* v. *Camp*, 3 Connecticut, 35; *Heelan* v. *Hoagland*, 10 Nebraska, 511; *Hout* v. *Hout*, 20 Ohio, 124; *Smith* v. *Hunt*, 13 Ohio, 260; *Allston* v. *Thompson*, Cheves (S. Car.), 271.

The two deeds from Lewis to his wife were, therefore, not effective as conveyances until January 9, 1904, and as on that date Lewis was indebted to the bank, he was not then possessed of property in Arizona sufficient to pay his debts and the deeds were without valuable consideration. Therefore, as to the bank, a prior creditor, the deeds were void. Par. 2698, Rev. Stat., Arizona, 1901.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a suit by the receiver of the bank as a judgment creditor in the District Court of the Third Judicial District of the Territory of Arizona, in and for the county of Maricopa, to set aside two deeds executed by Lewis, the debtor, to his wife, and have the property therein described subjected to the payment of his judgment.

The case was tried upon an agreed statement of facts. The District Court held the deeds to be void as against complainant. Defendants appealed to the Supreme Court of Arizona, which affirmed the judgment of the lower court. 85 Pac. Rep. 245. From that judgment this appeal was taken.

The facts were sufficiently stated by counsel for appellee as follows:

"On August 25 1903, while appellants, R. Allyn Lewis and Laetitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed conveying to her certain property situate in Phœnix, Maricopa County, Arizona, the consideration being love and affection. The execution of the deed was not acknowledged by Lewis before any officer authorized to take acknowledgments until January 9, 1904, when he did acknowledge the same before a notary in the State of New York. On December 19, 1903, in the State of New York, Lewis signed and delivered to his wife a second deed, conveying to her the same property, but with a more accurate description; the consideration therefor being also love and affection.

This second deed was likewise not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904.

"After Lewis had signed the first deed, but before he had acknowledged it, and before he had either signed or acknowledged the second deed, to wit, between November 5, 1903, and December 15, 1903, he became indebted in a large sum to the International Bank in Nogales, a bank doing business in Nogales, Arizona, which indebtedness was thereafter reduced to judgment in an action before the District Court in Arizona, brought by Fred Herrera, receiver for the bank. Execution was issued under this judgment; it was returned unsatisfied." The judgment remained unpaid.

"At the time Lewis signed the first deed to his wife, he was solvent and was not indebted to the said bank in any sum whatsoever; but at the time he signed the second deed, and on January 9, 1904, when for the first time, he acknowledged before the notary the execution of both the first and second deeds, he was indebted to said bank, and he was not possessed of property within the Territory of Arizona, subject to execution, sufficient to pay his existing debts."

It was admitted that there was no fraud in fact, and no intent in the mind of Lewis to defraud his creditors in the transfers made. Paragraph 2698 of the Revised Statutes of Arizona, 1901, is as follows:

"Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this Territory, subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be decreed to be void as to subsequent creditors or purchasers."

Paragraph 725 of the Revised Statutes of Arizona, 1901, reads thus:

"725. Every deed or conveyance of real estate must be

signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

As to the second deed, it was both signed and acknowledged after Lewis became indebted to the bank; as it was a gift, and as it did not appear that at the date of signing he was possessed of property in Arizona subject to execution sufficient to pay his debts, it followed that under paragraph 2698 of the Revised Statutes of Arizona the deed was void as to his prior creditor, the bank, and Herrera, the receiver.

The first deed, however, was signed by Lewis before he became so indebted. But if, as is contended, that deed did not become effective as a conveyance until it was acknowledged, namely, on January 9, 1904, on which day Lewis was already indebted to the bank, the deed was void as to it, a prior creditor. And that makes the only question in this case to be whether or not under the statutes of Arizona a deed signed, but not acknowledged, was valid as a conveyance of real property as to third parties.

The courts below held that a deed or conveyance of real property to be valid under the law of Arizona must be signed and acknowledged by the grantor, and that until acknowledged a deed or conveyance was ineffectual to convey title.

The construction of the statute by the local courts is of great, if not of controlling, weight. *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349.

This principle was applied in *Copper Queen Consolidated Mining Company* v. *Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, in which it was argued that a statute of Arizona in reference to the territorial board of equalization of that Territory had been taken almost *verbatim* from one of Colorado, and as that had been construed by the Supreme Court of that State contrary to the view taken by the Supreme Court of Arizona in the present case it should be followed, and we declined to do so, although various other

considerations were stated to sustain the ruling. In this case the same point is urged as respects paragraph 725, as having been transferred from the statutes of Texas in that regard, and having been construed differently from the judgment of the Supreme Court of Arizona here. But paragraph 220 of the Revised Statutes of Arizona of 1887, which was in the exact language of the Texas statute, and as follows: "220. Every deed or conveyance of real estate must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses thereto; or must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration," was changed in the Arizona Revised Statutes of 1901, paragraph 725, so as to read: "725. Every deed or conveyance of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration." Thus the legislative assembly of Arizona of 1901, so far from adopting the construction of the Texas statute, changed the language entirely and made it imperative that the deed should be signed and acknowledged before a proper officer. It made the acknowledgment by the grantor before a proper officer a prerequisite to the validity of the deed as much as the signing.

Paragraph 732 of the Revised Statutes of Arizona of 1901 is as follows:

"When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this title, the same shall, nevertheless, be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit."

But it is unnecessary to consider here whether the unacknowledged deed of Lewis to his wife might under the provisions of this section be claimed to be good as a contract, as that is not a question in this case. These deeds were finally and properly acknowledged, but the bank was then a prior

creditor, and as to a prior creditor the deeds, being gifts, were void, it not being made to appear that Lewis was then possessed of property in Arizona sufficient to pay his existing debts.

Judgment affirmed.